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No. 10-377

In The
Supreme Court of the United States

CHRISTOPHER MCDONOUGH,

Petitioner,

vs.

MICHAEL CROWE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does use of a suspect's coerced testimony in a judicial proceeding short of a criminal trial in which penalties may be imposed violate the Fifth Amendment?

2. Do routine police interview techniques that have garnered widespread judicial approval, such as lying to a suspect, accusing a suspect of lying, telling a suspect that physical evidence connects him to a crime and implying that others have implicated him in a crime, constitute coercion under the Fifth Amendment when applied to a minor?

3. Can a police officer's solely verbal conduct that does not involve any threat of harm constitute a violation of the Fourteenth Amendment's guarantee of substantive due process?

4. In order to constitute a violation of the Fourteenth Amendment's guarantee against deprivation of familial companionship, must a police officer's conduct "shock the conscience," as stated by this Court in *County of Sacramento v. Lewis*, 523 U.S. 833, 846-48 & n.8 (1998) ("*Lewis*"), or must it merely constitute "unwarranted interference" with the family's relationships, as articulated by the Ninth Circuit?

5. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a police officer may be liable under 42 U.S.C. § 1983 for interrogating a minor suspect using routine, solely verbal interrogation techniques that involved no threats of any kind?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, and defendant below, is individual Christopher McDonough.

Respondents, and plaintiffs below, are individuals Michael Crowe; Stephen Crowe; Cheryl A. Crowe; Shannon Crowe, a minor, through guardian ad litem Stephen Crowe; Judith Ann Kennedy (deceased); Margaret Susan Houser; Gregg Houser; and Aaron Houser.

Additional defendants below, who are not parties to this petition, but who remain defendants, are individuals Mark Wrisley; Barry Sweeney; Ralph Claytor; and Phil Anderson (collectively, the "Escondido defendants"), and Lawrence Blum, Ph.D.[1] Other defendants below, who were dismissed from the case but named in the caption on appeal, are City of Oceanside; City of Escondido; County of San Diego; Summer Stephan; Gary Hoover; Rick Bass and the National Institute for Truth Verification, a Florida limited liability company.

Additional plaintiffs below, who were dismissed from the case but named in the caption on appeal, are individuals Zachary Treadway; Joshua David Treadway; Michael Lee Treadway; Tammy Treadway; Janet Haskell; and Christine Huff.

There are no corporations involved in this proceeding.

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[1] The Escondido defendants and Dr. Blum are filing separate petitions for certiorari raising some of the same issues raised in the present petition.

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OPINIONS BELOW

The Ninth Circuit's initial opinion was designated for publication but did not appear in the official reports. (App. 5.)[2] The Ninth Circuit's order amending that opinion was published at 593 F.3d 841 (9th Cir. 2010) but it too was amended and superseded. (App. 86-89.) The judgment and opinion that is the subject of this petition is published at 608 F.3d 406. (App. 5-82.)

The district court orders granting in part defendants' motions for summary judgment are reported at 303 F.Supp.2d 1050 (S.D. Cal. 2004) and 359 F.Supp.2d 994 (S.D. Cal. 2005). (App. 90-196; 197-356.)

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit filed its opinion on January 14, 2010, but amended it on January 27, 2010. (App. 5, 86-89.) Petitions for panel rehearing and rehearing en banc were denied on June 18, 2010, and final judgment was entered that same day. (App. 5-82.) 28 U.S.C. § 1254(1) confers jurisdiction on the Court to review the second amended opinion issued on June 18, 2010.

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[2] All citations to the Appendix herein are to the Petitioners' Appendix attached to the Escondido defendants' petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment (Section I): No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 (2009): Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

> the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

A. Background.

Sometime between 10:00 and 11:00 p.m. on January 20, 1998, 12-year-old Stephanie Crowe was stabbed to death in her bedroom. (App. 201.) No one heard her scream. (App. 111.) The family dog did not bark. *Id.* And when officers from the Escondido Police Department arrived to investigate the following morning, they found no sign of forced entry. (App. 11.) Thus, they suspected the murder was an inside job. (*See* App. 111.)

The morning after the murder, Escondido officers questioned Stephanie's 14-year-old brother, Michael Crowe. (App. 109, 201.) He reported leaving his bedroom at 4:30 a.m. to go to the kitchen. (App. 112, 119-24, 201.) Although the position of his sister's body would have made it impossible for her bedroom door to be closed, Michael reported seeing Stephanie's door shut at that time. (App. 112, 115, 119-24.) The inconsistencies in Michael's story, coupled with the evidence suggesting that the murderer was someone

Stephanie knew, led the Escondido officers to suspect Michael. (*See* App. 12-13, 111.)

The Escondido Police Department asked the Oceanside Police Department to send an officer who knew how to operate a "computer voice stress analyzer" ("CVSA"). (App. 215.) On January 22, Oceanside sent a detective, petitioner Christopher McDonough to assist. *Id.*

McDonough conducted only one interview of Michael. (App. 14-15, 216.) McDonough's participation in that interview lasted about two hours. McDonough maintained a calm tone throughout; he never accused Michael of killing his sister and he never threatened Michael with punishment. (*See* App. 176 ["Defendants did not yell at Michael or even raise their voices"].) Michael asserted his innocence throughout McDonough's interview and never made any incriminating statements during it.

Here is the entirety of the Ninth Circuit's description of what happened in McDonough's interrogation of Michael:

> After Michael recounted the same series of events and again expressed how stressful the past two days had been, McDonough introduced the computer stress voice analyzer. McDonough told Michael the stress voice analyzer "was controlled by the government for a long time, okay, because it was so accurate." Detective McDonough asked Michael a long series of "yes or no" questions, including both control questions and questions specific

> to Stephanie's death. McDonough then reviewed the results with Michael and told him that the test "showed that you had some deception on some of the questions." McDonough asked him, "Is there something, though, that maybe you're blocking out ... in your subconscious mind that we need to be aware of?" McDonough pressured Michael about whether there was something Michael needed to confess, which Michael repeatedly denied. At this point (Escondido) Detective Claytor took over the interview. (App. 15.)
>
> (Escondido detective) Claytor next introduced the idea that Michael killed Stephanie but did not remember it. Michael started repeating over and over that he didn't remember doing anything. He also asked Claytor if he was sure Michael had done it, to which Claytor responded, "I'm sure about the evidence. Absolutely." At this point Claytor left and McDonough resumed the interview. As Claytor left Michael sobbed, "God. God. Why? Why? Why? Oh, God. God. Why? Why? I don't deserve life. I don't want to live. I can't believe this. Oh, God. God. Why? Why? How could I have done this? I don't even remember if I did it." When McDonough entered the room, Michael continued to state that he didn't remember and asked "How can I not remember doing something like that? That's not possible." The interview ended shortly thereafter. (App. 16-17.)

After the interview, McDonough left Escondido and had no further involvement in Escondido's

investigation of Michael. (App. 216.) McDonough did not participate in Escondido's further questioning of Michael; he was not present at, nor did he give input regarding, the questioning that ultimately led to Michael's confession that he had killed his sister. (App. 216; *see also* App. 17-24 [describing the further questioning without mentioning McDonough].)

During the next several weeks, Escondido's investigation broadened to include two of Michael's friends, 14-year-old Joshua Treadway and 15-year-old Aaron Houser. (App. 202-04.) A knife belonging to Aaron was found under Joshua's bed. (App. 204.) In interviews with police, Joshua subsequently admitted that Aaron had given him a knife and told him that the knife was the knife used to kill Stephanie, and that Aaron had participated in the killing with Michael.[3] (App. 204-07.) The knife used to kill Stephanie fit the description of Aaron's knife. (App. 203.)

On February 11, McDonough responded to Escondido's request to perform a CVSA interview of Aaron Houser. (App. 25.) By then, Escondido's detectives had already interviewed Aaron twice, without McDonough's involvement. (App. 25, 217.) The Escondido detectives had also already placed Aaron under arrest, again without McDonough's involvement. (*See* App. 25.)

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[3] Both the trial court and the district court found these statements were "voluntary and not coerced." (App. 256-57, 261.)

Over the course of nine and a half hours, Aaron was interviewed by McDonough, as well as three Escondido detectives. (App. 25.) Here is the entirety of the Ninth Circuit's description of McDonough's interview of Aaron:

> McDonough began the interrogation with the stress voice analyzer, describing it has (sic) he had for Michael. Eventually he began to ask Aaron to "theoretically" describe how he, Michael, and Joshua would each respectively kill Stephanie, if they were going to do so. McDonough suggested details to the story, through questions regarding what clothing Aaron would wear and how he would get rid of it, whether he would wear gloves, what time he would pick, and how he would get into the house. Later, McDonough told Aaron that Joshua and Michael had both said Aaron helped them kill Stephanie. Aaron denied it. Then McDonough told Aaron that the computer stress voice analyzer indicated that he was definitely involved. At this point Aaron began to even more vehemently protest his innocence:
>
> A. Let me put it this way: I don't know anything. I don't know who did. I don't know a single thing. I'm doing my best to tell the truth.
>
> Q. Aaron, calm down.
>
> A. I'm telling the truth to the best of my ability.
>
> Q. Calm down.

A. How can I calm down? I'm being accused of murder?

Q. Relax, Aaron.

A. How?

Q. Relax.

A. How? Relax how?

...

Q. You need to help yourself in the situation here, son.

A. What do I do?

Q. Tell the truth.

A. I did and you said I lied.

Q. Yes.

A. Okay.

Q. You lied. You have lied.

McDonough also told Aaron they had physical evidence against him and implied that they would soon uncover more. (App. 26-27.)

Like Michael, Aaron maintained his innocence throughout McDonough's interview. (App. 28.) When McDonough finished interviewing Aaron, he left Escondido and had no further involvement in Escondido's investigation into Stephanie's murder. (App. 217-18.)

After Escondido charged Michael and Aaron with Stephanie's murder, the boys' interviews were used during various pretrial proceedings – a "*Dennis H.* Hearing,"[4] grand jury proceedings and a "707 Hearing".[5] (App. 30-31.) During those pretrial proceedings, the trial judge reviewed the interview tapes and concluded that (1) McDonough's questions to Michael were not coercive and (2) Aaron's statements to McDonough were voluntary and not the result of coercion. (App. 205, 284.)

The District Attorney later dismissed the charges against the boys and they were never tried for Stephanie's murder. (App. 32-33.)

B. District Court Proceedings.

After the District Attorney dropped the charges against Michael and Aaron, they and their families filed a joint complaint naming numerous defendants, including McDonough. (App. 33.) As to McDonough, the complaint alleged conspiracy to violate, and violation of, plaintiffs' Fourth, Fifth and Fourteenth

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[4] Under California law, when a minor is taken into custody, he must be released within 48 hours, unless, *inter alia*, a petition is filed in the juvenile court explaining why he should be declared a ward of the court. The hearing on that petition called a "*Dennis H.* Hearing." *See* Cal. Welf. & Inst. Code § 631 (2008); *see also* App. 31, n.7.

[5] A "707 Hearing" determines whether a minor should be tried as an adult. *See* Cal. Welf. & Inst. Code § 707 (2008); *see also* App. 31, n.9.

Amendment rights in contravention of 42 U.S.C. § 1983.

McDonough moved for summary judgment on the claims against him. (App. 34, 213.) The district court granted McDonough's motions on February 17, 2004 and February 28, 2005. (App. 34.) It entered judgment on July 26, 2005.

C. The Appeal.

The Crowe and Houser plaintiffs (collectively, "plaintiffs") appealed. (App. 34.) They challenged the judgment in favor of McDonough as to the following theories: (1) conspiracy to violate the boys' Fourth Amendment rights, (2) violation of the boys' Fifth Amendment right against compelled self-incrimination, (3) violation of the boys' Fourteenth Amendment right to be free from coercive interrogations that "shock the conscience," and (4) violation of the boys' parents' Fourteenth Amendment rights to familial companionship. *Id.*[6]

On January 14, 2010, the Ninth Circuit issued an opinion affirming in part and reversing in part the district court's grant of summary judgment. The court affirmed the grant of summary judgment for

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[6] Plaintiffs also appealed as to other defendants, and City of Escondido, Wrisley, Sweeney, Anderson, and Claytor cross-appealed the district court's denial of summary judgment as to certain claims against them. (App. 34-35.) Disposition of those other claims is not at issue here.

McDonough on the plaintiffs' Fourth Amendment conspiracy claims. However, the court reversed the grant of summary judgment as to McDonough on the other appealed claims.

On the compelled self-incrimination claim, the Ninth Circuit concluded that *Chavez v. Martinez*, 538 U.S. 760 (2003) permits § 1983 claims for Fifth Amendment violations based on the use of testimony in a pretrial proceeding. (App. 36-44.) The Ninth Circuit also held that McDonough was not entitled to qualified immunity for any Fifth Amendment violation, reasoning that "[i]n 1998, when defendants interrogated Michael and Aaron, the clearly established rule in this Circuit was that a § 1983 cause of action for a violation of the Fifth Amendment's Self-Incrimination Clause arose as soon as police employed coercive means to compel a statement." (App. 44-45, citing *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009) ("*Stoot*") and *Cooper v. Dupnik*, 963 F.2d 1220, 1242 (9th Cir. 1992) ("*Cooper*"), overruled on other grounds by *Chavez*, 538 U.S. 760.)

On the Fourteenth Amendment claim for coercive interrogation, the Ninth Circuit found that the interrogations shocked the conscience even though they involved no threats or physical violence. (App. 45-47.) Again, the Ninth Circuit held McDonough was not entitled to qualified immunity, reasoning that "it was clearly established, at the time of the boys' interrogations, that the interrogation techniques defendants chose to use 'shock the conscience.' Defendants had the benefit of this Court's holding in *Cooper*, as well

as Supreme Court case law directing that the interrogation of a minor be conducted with 'the greatest care,' *In re Gault*, 387 U.S. at 55." (App. 48.)

On the familial companionship claim, the Ninth Circuit rejected the usual Fourteenth Amendment "shocks the conscience" standard, and concluded that the detentions were actionable because they were an "unwarranted interference" with the families' relationships. (App. 70 n.23.)

D. The Ninth Circuit Twice Amends Its Opinion.

Because the disposition section of the Ninth Circuit's January 14, 2010 opinion was inconsistent with the body of the opinion, the Ninth Circuit sua sponte issued an order amending the disposition section of its opinion on January 26, 2010. (App. 87-89.) The amended opinion was substantively identical to the original opinion as to McDonough.

McDonough petitioned for panel rehearing and rehearing en banc following issuance of the amended opinion. Other parties filed petitions for rehearing as well. On June 18, 2010, the Ninth Circuit issued an order denying the petitions for rehearing but further amending the opinion. (App. 6-9.) The amendments further corrected the disposition summary but did not change the substance of the opinion.

REASONS TO GRANT THE PETITION

Review is necessary to resolve an express circuit conflict concerning whether use of coerced testimony in pretrial criminal proceedings violates the Fifth Amendment. A plurality of this Court has suggested that "mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness." *Chavez*, 538 U.S. at 769. However, the Court has never decided what constitutes a "criminal case." Two circuits have drawn a distinction between use of compelled testimony in the *charging* context and use of such testimony in the *ultimate adjudicatory* context, holding that the former does not violate the Fifth Amendment. In the present case, the Ninth Circuit has joined two other circuits in holding the exact opposite, concluding that use of statements in pretrial proceedings *can* violate the Fifth Amendment.

It is vital that the Court address and resolve this conflict among the circuits. High-stakes civil lawsuits frequently result from pretrial use of a suspect's testimony. The outcome of such claims should not turn on where in the country they arise. Granting review would allow the Court to articulate a uniform, bright-line test as to when such claims are viable. It would also greatly assist the day-to-day work of prosecutors and police officers throughout the country as they decide how to conduct interrogations and whether and when to use a suspect's testimony. These government officials must be able to predict with

some certainty the circumstances under which they may properly use testimony.

Review is also necessary to delineate what constitutes coercive interrogation of a minor under the Fifth Amendment. The Ninth Circuit's opinion exposes officers to liability for routine interrogation techniques – i.e., lying to the suspect, accusing the suspect of lying, and implying that others have implicated the suspect. Case law upholds the use of these techniques in most circumstances. If they are unconstitutional, or if there are special rules for interrogating minors, police officers and the academies that train law enforcement personnel need to know. Moreover, so long as the Ninth Circuit's opinion in the present case is binding authority on lower courts, public entities across the country will be vulnerable to lawsuits brought on the basis of what, until now, were well-established, judicially sanctioned interrogation techniques.

Review is also necessary to resolve whether a police officer's solely verbal conduct involving no threats of any kind violates the Fourteenth Amendment. The Court has held that a violation of substantive due process under the Fourteenth Amendment requires conduct that "shocks the conscience." *Lewis*, 523 U.S. 833. The circuits have uniformly held that only episodes of extreme physical brutality or credible threats of physical force meet this stringent standard and have repeatedly rejected claims based on mere verbal conduct or harassment. Yet in the present case, the Ninth Circuit has parted company with

these other circuits, holding instead that non-threatening verbal conduct suffices. Given the frequency of police interrogations, it is vitally important that the Court resolve the split among the circuits regarding when purely verbal conduct constitutes "conscience-shocking" interrogation – and specifically, whether there is a special rule for minors. Without clarification of the law, the Ninth Circuit's opinion in this case will open the gates to a flood of litigation against public entities and law enforcement officers.

Finally, review is necessary because the Ninth Circuit has disregarded this Court's holding that *any* Fourteenth Amendment substantive due process claim hinges on whether the challenged conduct "shocks the contemporary conscience." *See Lewis*, 523 U.S. at 836, 847 n.8. The opinion below carves out a special rule for substantive due process claims alleging deprivation of familial companionship, holding that the plaintiff must only establish "unwarranted interference" to establish such a claim, not conduct that "shocks the conscience." (App. 70 n.23.) That standard is contrary to *Lewis* and to other published federal appellate decisions. Because virtually any detention of a minor raises the specter of a deprivation of familial relationship claim, it is critically important that the Court resolve the confusion created by the Ninth Circuit's decision.

I. REVIEW IS NECESSARY TO RESOLVE AN EXPLICIT CONFLICT BETWEEN THE CIRCUITS ON THE IMPORTANT AND RECURRING ISSUE WHETHER USE OF COERCED TESTIMONY IN PRETRIAL PROCEEDINGS VIOLATES THE FIFTH AMENDMENT.

A. The Court Has Never Delineated What Constitutes A "Criminal Case" For Purposes Of Establishing A "Use" Violation Under The Fifth Amendment.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. As relevant here, the Fifth Amendment bars the prosecution from using coerced testimony in a "criminal case." *Chavez*, 538 U.S. at 769 (plurality opinion) ("[M]ere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness.").

However, this Court has left open what constitutes a "criminal case," expressly concluding in *Chavez* that it "need not decide today the precise moment when a 'criminal case' commences...." *Chavez*, 538 U.S. at 766-67.

B. There Is An Explicit Conflict Among The Circuits Regarding Whether "Criminal Case" Means Only A Suspect's Case-In-Chief Or Whether It Encompasses Pretrial Proceedings As Well.

In the seven years since *Chavez*, five circuits have split on the vitally important issue whether pretrial proceedings constitute a "criminal case" for purposes of the Fifth Amendment – that is, whether use of a coerced confession in pretrial proceedings is unconstitutional.

1. The Third and Fourth Circuits have rejected Fifth Amendment claims based on pretrial use of a suspect's statements.

The Third and Fourth Circuits have expressly declined to find Fifth Amendment violations when compelled testimony is used in the *charging* context rather than the *ultimate adjudicatory* context:[7]

In *Renda v. King*, 347 F.3d 550 (3rd Cir. 2003), the police subjected a suspect to a custodial interrogation without *Miranda* warnings. The prosecution later used the suspect's un-*Mirandized* statements to

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[7] In addition, the Fifth Circuit has stated in dicta that "[t]he Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only *at* trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right." *Murray v. Earle*, 405 F.3d 278, 285 (5th Cir. 2005) (emphasis in original).

obtain an indictment. *Id.* at 552. As in the present case, the prosecution dropped the charges prior to trial and the suspect subsequently filed a § 1983 claim asserting that the police had violated her Fifth Amendment rights. *Id.* at 553. Citing *Chavez*, the Third Circuit affirmed the dismissal of the suspect's Fifth Amendment claim because "it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution." *Id.* at 559.

Similarly, in *Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005), the Fourth Circuit relied on *Chavez* to hold that a motorist who had been served with a summons and charged with obstruction of justice because he declined to produce proof of automobile insurance, could not state a Fifth Amendment violation. On appeal from the district court's dismissal of the action, the Fourth Circuit held that Burrell's § 1983 suit was precluded by *Chavez,* which required that one be "'compelled to be a witness against himself in a criminal case'" before "'a violation of the constitutional right against self-incrimination occurs.'" *Burrell*, 395 F.3d at 513-14 (emphasis omitted) (citing *Chavez*, 538 U.S. at 770).

2. The Second, Seventh and Ninth Circuits hold that pretrial use of a suspect's statements may violate the Fifth Amendment.

Three other circuit courts have come to the exact opposite conclusion of *Renda* and *Burrell. Sornberger*

v. City of Knoxville, 434 F.3d 1006 (7th Cir. 2006) and *Weaver v. Brenner*, 40 F.3d 527 (2d Cir. 1994) held that use of a coerced statement at *any* criminal proceeding against the declarant violates his or her Fifth Amendment rights. *Weaver*, 40 F.3d at 535-36 (use at grand jury); *Sornberger*, 434 F.3d. at 1026-27 (use at probable cause hearing); *see also Higazy v. Templeton*, 505 F.3d 161, 170, 173 (2d Cir. 2007) (reaffirming Second Circuit's pre-*Chavez* ruling in *Weaver v. Brenner*; held, government's use of suspect's statements against him at preliminary bail hearing was sufficient basis for alleging Fifth Amendment violation).

In so holding, both the Second and Seventh Circuits relied upon cases stating the rule that the privilege against self-incrimination permits a suspect to *decline to testify* at any time starting at a custodial interrogation. *Sornberger*, 434 F.3d at 1027 n.15 ("[P]recedent confirms that the right to be free from self-incrimination may attach at pre-trial stages of the criminal prosecution."); *Weaver*, 40 F.3d at 535 (same). In essence, *Sornberger* and *Weaver* reasoned that because the right to remain silent applies prior to the beginning of the prosecution's case-in-chief, so does the prohibition against using compelled testimony.

But the breadth of the right to decline to speak is not coextensive with the breadth of the prohibition against the use of compelled testimony in a "criminal proceeding." This Court held as much in *Chavez* when it stated: "Although Martinez contends that the

meaning of 'criminal case' should encompass the entire criminal investigatory process, including police interrogations, we disagree.... We need not decide today the precise moment when a 'criminal case' commences; it is enough to say that police questioning does not constitute a 'case'...." *Chavez*, 538 U.S. at 766-67 (plurality opinion).

Neither *Sornberger* nor *Weaver* considered the distinction between the broad reach of the Fifth Amendment as applied to the prophylactic right to remain silent and the narrower reach of the Fifth Amendment as applied to "use" violations. Nonetheless, in *Stoot*, 582 F.3d 910, the Ninth Circuit joined the Second and Seventh Circuits in holding that pretrial use of a suspect's testimony could violate the Fifth Amendment. As *Stoot* explained: "The Stoots' Fifth Amendment claim in this case falls squarely within the gray area created by *Chavez*. Unlike Martinez, who was never charged with any crime, Paul's statements were used against him in (1) the Affidavit filed in support of the Information charging him with child molestation; (2) a pretrial arraignment and bail hearing; and (3) a pretrial evidentiary hearing to determine the admissibility of his confession." *Id.* at 923-24. The Ninth Circuit held that the first two of "these forms of reliance on Paul's statements constitute 'use' in a 'criminal case' under *Chavez*." *Id.* at 924.

In so holding, the Ninth Circuit expressly stated that it was "adopt[ing] the general approach of *Sornberger* and *Higazy*: A coerced statement has been

'used' in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status." *Id.* at 925 ("We therefore join the Second and Seventh Circuits in holding that use of the coerced statements at trial is not necessary for Paul to assert a claim for violation of his rights under the Fifth Amendment." (emphasis omitted)).

In the present case, the Ninth Circuit has again held that use of a suspect's testimony in proceedings short of a criminal trial violates the Fifth Amendment. The two minor plaintiffs in the present case were never brought to trial. Their allegedly coerced confessions were used only in pretrial proceedings to retain them in custody and determine whether they would be tried as juveniles or adults, as well as in a grand jury proceeding. None of these proceedings were criminal trials – i.e., they were not proceedings that could "lead to the infliction of criminal penalties" *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

C. It Is Essential That The Court Grant Review To Resolve The Circuit Conflict.

It is necessary for the Court to resolve the conflict as to whether use of coerced testimony in pretrial proceedings violates the Fifth Amendment. Public entities and law enforcement officers regularly face lawsuits based on interrogations and the resulting

testimony. Prosecutors, on a daily basis, must make decisions regarding if and how a criminal defendant's statements will be used in a particular proceeding. Granting review would allow the Court to articulate a bright-line test as to when Fifth Amendment claims may be brought on the basis of use of coerced statements at proceedings short of an actual criminal trial. This would provide certainty on the front lines of the criminal justice system regarding what is and is not allowed, eliminating confusion in both civil and criminal cases.

II. REVIEW IS NECESSARY TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS ON THE CRITICALLY IMPORTANT QUESTION OF WHAT CONSTITUTES COERCIVE INTERROGATION OF A MINOR SUSPECT.

The Ninth Circuit's opinion also creates a circuit split on the issue whether certain routinely-used interrogation techniques constitute coercion for purposes of a Fifth Amendment claim.

McDonough used garden variety police interrogation techniques that have garnered widespread judicial approval for decades – he accused a suspect of lying, he implied that others had implicated the suspect in the crime and he touted the accuracy of the CVSA machine.

The Ninth Circuit concluded this conduct could be found coercive. This holding places the Ninth

Circuit squarely at odds with uniform case law approving the exact interrogation techniques that McDonough employed.

The youth of the suspects does not obviate the confusion created by the Ninth Circuit's opinion. While the Court has spoken generally of the need to treat the interrogation of minors with greater sensitivity than the interrogation of adults, it has never delineated whether and when the routine techniques that McDonough employed here constitute coercion.

A. The Ninth Circuit Opinion Draws Into Question Routine Interrogation Techniques That Until Now Have Garnered Widespread Judicial Acceptance.

The Court regularly balances the need for effective police questioning against the need to safeguard against coercive interrogation. The Court has recognized that "'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted. Admissions of guilt are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986). Nevertheless, "the interrogation process is 'inherently coercive' and ... , as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion." *Id.*

Thus, the *sine qua non* of coercion is compulsion – i.e., undermining the suspect's ability to exercise his free will. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) ("[T]he touchstone of the Fifth Amendment is compulsion."); *Cunningham v. City of Wenatchee*, 345 F.3d 802, 810-11 (9th Cir. 2003) (compulsion requires overcoming the suspect's free will).

The federal courts have repeatedly held that the interrogation techniques used in the present case do not meet this standard. *See, e.g.*, *Cunningham*, 345 F.3d at 810-11 (eight-hour interrogation *not* coercive where the officer never yelled or used violence or the threat of violence, and where he did not refuse to give the suspect a break for food; rejecting suspect's argument that police had undermined his free will through deception, fear, fatigue, threats of punishment and promises of leniency); *Pollard v. Galaza*, 290 F.3d 1030, 1033-34 (9th Cir. 2002) ("[M]isrepresentations made by law enforcement in obtaining a statement, while reprehensible, does [sic] not necessarily constitute coercive conduct"); *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773 (4th Cir. 1995) (police may misrepresent polygraph results; use of polygraph is not psychological coercion); *Contee v. United States*, 667 A.2d 103 (D.C. 1995) (officers are allowed to misrepresent capabilities of CVSA, including results of test); *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 494 (9th Cir. 1997) (officers' repeated insistence that the suspect tell the truth did not amount to coercion); *Wyrick v. Fields*, 459 U.S. 42, 48 (1982)

(rejecting rule that "use of polygraph 'results' in questioning ... [that] is inherently coercive").

California law is in accord. It holds that police may misrepresent the evidence against a suspect, including falsely telling a suspect that physical evidence has connected him to the crime or that an accomplice has confessed. *See, e.g.*, *People v. Farnam*, 47 P.3d 988 (Cal. 2002) (police told suspect his fingerprints were found on victim's wallet); *People v. Watkins*, 85 Cal. Rptr. 621 (Cal. Ct. App. 1970) (police told suspect his fingerprints were found on getaway car); *People v. Parrison*, 187 Cal. Rptr. 123 (Cal. Ct. App. 1982) (police told suspect that evidence showed he had handled gun); *People v. Felix*, 139 Cal. Rptr. 366 (Cal. Ct. App. 1977) (police told suspect that accomplice confessed).

In addition, the police can bring a suspect in for questioning under false pretenses, including failing to tell him that he is part of a criminal investigation. *See, e.g.*, *People v. Chutan*, 85 Cal. Rptr. 2d 744, 746-47 (Cal. Ct. App. 1999) (police told child molestation suspect that they wanted to talk to him about his children, but failed to disclose that the interview was part of a criminal investigation).

The Ninth Circuit's decision in the present case has thrown the law into disarray by concluding that the very same techniques that courts across the country have approved for decades run afoul of the Fifth Amendment.

Moreover, the Ninth Circuit's decision casts doubt on what constitutes compelled testimony. McDonough's interrogation yielded no confession or other involuntary incriminating statement. Michael did not say *anything* incriminating during McDonough's interview. Likewise, "Aaron maintained his innocence through the end of the 9.5 hour interrogation." (App. 28.) Further, even assuming that Aaron's answers to McDonough's hypothetical questions about how each boy would have killed Stephanie were incriminating, those answers were *voluntary*. Both the state court and the district court specifically found this was so. (App. 284-85 ["[A]s a matter of law, any statements made by Aaron Houser on January 27 or February 11 were not the product of coercion."]).

Thus, the Ninth Circuit's decision in the present case not only creates confusion regarding whether garden variety police interrogation techniques constitute unconstitutional coercion, it brings into question what constitutes compelled testimony.

B. This Court Has Spoken Generally Regarding The Special Care That Must Be Taken When Interrogating Minors, But It Has Never Addressed Whether Routine Interrogation Techniques Are Coercive When Applied To Minors.

The age of the suspects does not resolve the confusion injected into the law by the Ninth Circuit's opinion in this case.

The Court has recognized that the coerciveness of the custodial setting is of heightened concern where a juvenile is under investigation. *See, e.g.*, *In re Gault*, 387 U.S. 1, 55 (1967) ("If counsel was not present for some permissible reason when an admission was obtained [from a child], the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (observing that a 14-year-old suspect could not "be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions"); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality reasoned that because a 15-year-old minor was particularly susceptible to overbearing interrogation tactics, the voluntariness of his confession could not "be judged by the more exacting standards of maturity").

But while the Court has articulated general signposts regarding the interrogation of minors – i.e., police should use the "greatest care" to ensure an admission is voluntary – it has never determined whether and when the routine interrogation techniques that were utilized by McDonough are coercive when applied to minors. The Court has never addressed whether such garden variety techniques as telling a suspect that physical evidence connects him to the crime scene or touting the accuracy of a truth

verification machine violates a minor's Fifth Amendment rights.

C. It Is Essential That The Court Grant Review To Resolve The Circuit Conflict By Confirming That The Garden Variety Interrogation Techniques Involved In This Case Do Not Violate The Fifth Amendment, And Also To Avoid Undermining Legitimate Claims Of Qualified Immunity.

The doubt that the present case sows must be resolved. If the routine techniques that McDonough utilized here violate the Constitution or if there are special rules for minors, police officers need to know, so that they can ensure that they obtain testimony that is admissible in court and avoid inadvertently violating a suspect's constitutional rights. Police academies and police departments require guidance regarding what interrogation techniques are constitutionally-permissible so that they can train officers accordingly. Moreover, public entities across the country are now vulnerable to lawsuits brought on the basis of what, until now, were well-established, judicially sanctioned interrogation techniques.

At the very least, the Court should grant review to reaffirm that officers who use routine police interrogation techniques and who do not actually compel testimony are entitled to qualified immunity. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*

v. Briggs, 475 U.S. 335, 341 (1986). For liability to be imposed, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Here, although the Court has suggested that different standards govern interrogation of minors under the Fifth Amendment, it has not provided guidance regarding whether the routine interrogation techniques that McDonough utilized here violate the Constitution. During McDonough's relatively short interviews, he calmly questioned the minor suspects using routine interrogation techniques – he suggested the physical evidence implicated the suspects, he told them the CVSA was accurate and that it showed the suspects were engaging in deception. No reasonable police officer would have known in advance that these types of accepted police practices would subsequently be deemed improper. Accordingly, McDonough is entitled to qualified immunity. *See Safford Unified Sch. Dist. #1 v. Redding*, 129 S.Ct. 2633, 2643 (2009).

III. REVIEW IS NECESSARY TO RESOLVE A CONFLICT REGARDING THE CRITICALLY IMPORTANT QUESTION WHETHER PURELY VERBAL CONDUCT NOT INCLUDING THREATS VIOLATES THE FOURTEENTH AMENDMENT.

The Ninth Circuit has broken new ground with respect to the Fourteenth Amendment, as well. Repudiating the Court's precedents and the case law of the

other circuits, the Ninth Circuit has held that purely verbal conduct devoid of any threats of harm "shocks the conscience" and therefore subjects a police officer to liability under the Fourteenth Amendment. Indeed, McDonough never raised his voice, let alone threatened the juvenile suspects in any way. Concluding that McDonough's alleged conduct nonetheless violates the Fourteenth Amendment thus represents a stark departure from the case law of the other circuits.

A. To Violate The Fourteenth Amendment's Guarantee Of Substantive Due Process, A Police Officer's Conduct Must "Shock The Conscience."

Substantive due process principles govern claims of excessive force by a police officer arising outside the context of a seizure (i.e., outside the Fourth Amendment). *See Lewis*, 523 U.S. at 843. Those principles "forbid[ ] the government from depriving a person of life, liberty, or property in such a way that 'shocks the conscience'...." *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998).

As this Court's case law makes clear, the "shocks the conscience" standard is stringent; "only the most egregious official conduct can be said to be arbitrary in a constitutional sense" – i.e., "conduct intended to injure in some way unjustifiable by any government

interest." *Lewis*, 523 U.S. at 846, 849 (internal quotation marks and citations omitted).

Courts have used various tests to identify conduct sufficiently extreme to meet this high standard, which protects the Constitution from demotion to merely "a font of tort law." *Lewis*, 523 U.S. at 847 n.8, 848. For example, courts have held that the acts must be such as to "offend even hardened sensibilities," *Rochin v. California*, 342 U.S. 165, 172 (1952), be "offensive to human dignity," *id.* at 174, "uncivilized [] and intolerable," *Hasenfus v. La Jeunesse,* 175 F.3d 68, 72 (1st Cir. 1999), or must constitute force that is brutal, inhumane, or vicious, *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 726 (6th Cir. 1996).

Negligence is not enough. *Lewis*, 523 U.S. at 849 (negligence is "categorically beneath the threshold of constitutional due process"). Rather, "the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability." *Id.* at 848.

B. Verbal Conduct Generally Does Not Rise To The Level Of A Violation Of The Fourteenth Amendment.

Until the Ninth Circuit's decision here, the well-established rule was that "conscience shocking" behavior requires far more than the psychological manipulation alleged by plaintiffs.

Substantive due process violations generally involve extreme or sustained physical brutality.[8] *See, e.g., Rochin*, 342 U.S. 165 (suspect's stomach forcibly pumped to obtain evidence); *Harrington v. Almy*, 977 F.2d 37, 43-44 (1st Cir. 1992) (suspended police officer required to undergo a penile plethysmograph as condition of reinstatement); *Neal v. Fulton County Bd. of Educ.*, 229 F.3d 1069, 1076 (11th Cir. 2000) (student blinded when coach intentionally struck him with metal weight); *Rogers v. City of Little Rock*, 152 F.3d 790, 797 (8th Cir. 1998) (rape by police officer in connection with car stop); *Hemphill v. Schott*, 141 F.3d 412, 419 (2d Cir. 1998) (police officers aided third-party in shooting plaintiff); *Webb v. McCullough*, 828 F.2d 1151, 1154 (6th Cir. 1987) (principal forced way into bathroom where student was hiding, grabbed her from floor, threw her against wall, and slapped her).

Where, as here, the conduct at issue is not physical, the "conscience-shocking" standard has traditionally been very difficult to meet. Verbal conduct or

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[8] The constitutional hurdle is so high that even the wrongful use of *physical force* may not constitute a substantive due process violation. *See, e.g., Cummings v. McIntire*, 271 F.3d 341, 342-45 (1st Cir. 2001) (affirming summary judgment in favor of police officer who "unnecessarily utilized physical force" against a pedestrian; held, officer's conduct "though deplorable, unprofessional and offensive – did not 'shock the conscience,' and thus fell short of establishing a constitutional violation"; officer did not push plaintiff "maliciously and sadistically for the very purpose of causing harm").

harassment generally does not suffice. *See, e.g., Emmons v McLaughlin*, 874 F.2d 351, 353 (6th Cir. 1989) (threats causing fear for plaintiff's life not an infringement of constitutional right); *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979) (allegations that sheriff laughed at prisoner and threatened to "hang him" not sufficient to establish a constitutional violation); *Lamar v. Steele*, 698 F.2d 1286 (5th Cir. 1983) (claim based on "mere words" or "idle threats" not sufficient to establish a violation of substantive due process); *Bibbo v. Mulhern*, 621 F.Supp. 1018, 1025 (D. Mass. 1985) (verbal abuse and harassment falling short of physical force was not the type of conduct for which substantive due process provides redress); *see also Fox v. Hayes*, 600 F.3d 819, 841 (7th Cir. 2010) (summarizing the "shocks the conscience" standard as: "For example, on the one hand, forcing an emetic down a person's throat to forcibly extract evidence from a suspect's stomach shocks the conscience, but on the other hand, lying to, threatening, or insulting a suspect does not." (internal citations omitted)).

This is so because "[t]he Constitution does not protect against all intrusions on one's peace of mind. Fear or emotional injury which results solely from verbal harassment or idle threats is generally not sufficient to constitute an invasion of an identified liberty interest." *Pittsley v. Warish*, 927 F.2d 3, 7 (1st Cir. 1991) ("*Pittsley*").

Thus, in *Cruz-Erazo v. Rivera-Montanez*, 212 F.3d 617 (1st Cir. 2000), the First Circuit found no

substantive due process violation even where police officers verbally harassed plaintiff homeowners, intimidated them, occupied their property without permission, deliberately lied in official documents, and perjured themselves in official court proceedings with the intention of causing the homeowners harm.

Likewise, in *Souza v. Pina*, 53 F.3d 423 (1st Cir. 1995), the Court found no substantive due process violation when a murder suspect committed suicide after prosecutors encouraged the media to link him to a series of murders. While the First Circuit lamented the conduct of the prosecutors in that case, it held that the facts alleged simply did not rise to the level of conscience-shocking conduct. *See id.* at 427.

Only a handful of cases have found verbal conduct extreme enough to meet the "shock the conscience" standards. Those cases invariably involve some sort of imminent, credible threat to the plaintiff. *See, e.g.*, *Belcher v. Norton*, 497 F.3d 742, 753-54 (7th Cir. 2007) (deputy marshal forced plaintiff to sign over title to his car by threatening to arrest him for disorderly conduct, approaching him with handcuffs and telling him that he was calling for backup);[9] *Meeker v. Edmundson*, 415 F.3d 317, 322-23 (4th Cir. 2005) (allegation that wrestling coach "initiated and

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[9] The dissent in *Belcher* would have rejected a Fourteenth Amendment claim because the marshal made no physical threat, "did not use physical force or violence, did not taunt or mock them, did not use racial or sexual epitaphs, nor did he subject them to public ridicule." *Id.* at 756.

encouraged" students to physically abuse student could support substantive due process claim even if coach did not actually administer the beatings himself); *Hawkins v. Holloway*, 316 F.3d 777 (8th Cir. 2003) (allegation that sheriff pointed gun at his employees and threatened to shoot them stated substantive due process claim, but allegations of abrasive conduct and verbal harassment did not); *Burton v. Livingston*, 791 F.2d 97, 99-100 (8th Cir. 1986) (Although "in the usual case mere words, without more, do not invade a federally protected right," prison guard's conduct violated Fourteenth Amendment where he "pointed a lethal weapon at the prisoner, cocked it, and threatened him with instant death.").

The only exception to the rule that the only verbal conduct that "shocks the conscience" is an imminent threat, is *Cooper*, 963 F.2d 1220. In *Cooper*, the police conducted an unlawful interrogation in a *deliberate* and *premeditated* attempt to prevent a suspect from testifying at his own trial or invoking an insanity plea. *Id.* at 1249-50. This conduct shocked the conscience because its *intended purpose* was to deprive the suspect of his constitutionally-guaranteed right to defend himself. *Id.* ("The primary aggravating circumstance is the Task Force's purpose of making it difficult, if not impossible, for a charged suspect to take the stand in his own defense – as Taylor said, 'to help keep him off the stand.'"), (police intended to "impinge on the suspect's right to remain silent or his right to testify"), ("purpose was to deprive a suspect of

the [insanity] defense altogether, not just to defeat it with the facts or the truth").[10]

C. A Suspect's Juvenile Status Would Not Render McDonough's Calm, Purely Verbal Conduct A Violation Of The Fourteenth Amendment.

While the Ninth Circuit suggests that the "shocks the conscience" standard should be lower for juveniles (App. 46), it conspicuously fails to cite case law suggesting the manner of interrogation employed by McDonough here rises to such an impermissible level. In fact, the courts have routinely rejected the notion that conduct falling short of physical abuse suffices, even as to juveniles.

For example, in *Pittsley*, police officers told two young children – ages four and ten – that "if we see your father on the street again, you'll never see him

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[10] The aggravating circumstances that rendered the purely verbal conduct in *Cooper* "conscience-shocking" – i.e., the widespread conspiracy to deprive the suspect of his ability to defend himself at trial – is not present here. Nothing in the record suggests that McDonough was part of an "unlawful plot to deprive an accused suspect of the privilege of testifying in his own defense." *Id.* at 1250. McDonough had no motive to frame the boys; he had no prior relationship with Escondido or any animosity towards the boys. Nor did McDonough have any control over Escondido's criminal investigations. His limited role was to administer the CVSA examinations – examinations that the undisputed evidence showed McDonough believed would yield the facts or the truth.

again."[11] 927 F.2d at 5. When the police subsequently arrested the suspect, they "use[d] vulgar language" and refused to let the children give him a hug and kiss goodbye. *Id.* Nonetheless, the court held: "The officers' actions and statements made directly to the children did not constitute a violation of any protected liberty interest. The acts complained of did not result in a physical touching or physical injury, and, thus, fall short of the type of conduct which the due process clause was intended to protect." *Id.* at 9. The court expressly rejected Pittsley's argument that the vulnerability of the young children made the arresting officer's actions and language "so brutal, offensive and intimidating as to 'shock the conscience.'" *Id.* at 7. It held: "The children's alleged fear or trauma which resulted from these spoken words and actions in this instance ... [was] not sufficient to rise to the level of a constitutional violation under the standard enunciated in *Rochin*." *Id.*

Similarly, in *Robertson v. Plano City of Texas*, 70 F.3d 21 (5th Cir. 1995), the Fifth Circuit held that a 16-year-old burglary suspect's parents could not establish that the police had violated his substantive due process rights when they came to his house, notified him that he was a suspect, failed to give him *Miranda* warnings, questioned him and knowingly admonished him about the adult penalties for car

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[11] The suspect was the children's mother's live-in companion, not the children's biological father.

burglary despite the fact that they knew he was a minor. The court held that "neither Fourteenth Amendment case law, nor case law construing other constitutional requirements ... afforded the Robertsons' son (16 years old) a right to be free from an erroneous admonishment regarding punishment and prison." *Id.* at 24. Noting the case law holding that verbal threats by police without more do not violate the constitution, the Fifth Circuit held that the juvenile suspect could not state a claim. *Id.* at 25. It observed: "Jonathan's status (16-year-old juvenile) [does not] create an exception to the general rule." *Id.*

D. The Court Should Grant Review To Resolve The Circuit Conflict, Bar The Amorphous Constitutional Tort That The Ninth Circuit Has Created, And Avoid Undermining Legitimate Claims Of Qualified Immunity.

It is critical that the Court resolve the split among the circuits created by the Ninth Circuit's opinion in this case regarding what constitutes a "conscience-shocking" interrogation, and whether there is a special rule for minors. The Ninth Circuit has repudiated the case law of the other circuits by holding that non-threatening verbal conduct "shocks the conscience," subjecting a defendant to Fourteenth Amendment liability. This groundbreaking holding will open the floodgates of litigation. Police departments across the country will be subject to litigation

on the basis of amorphous standards that vary from courtroom to courtroom.

This case illustrates the problem. The district court and the trial court (in the underlying criminal case) listened to the same tape recordings of the interviews and found that McDonough's conduct was not extreme or outrageous. In fact, they concluded that the suspects' statements were voluntary and not coerced. Nonetheless, the Ninth Circuit reviewing the same material concluded a jury could find that the statements were coerced and indeed that the interrogations shocked the conscience.

It is essential that the Court grant review to close the door on this sort of amorphous constitutional tort subject to widely varying sensibilities. Indeed, the Court has been "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). The Court has cautioned that it must "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [federal judges].'" *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

At the very least, the Court should grant review to make it clear that McDonough – and police officers like him – are entitled to qualified immunity. The doctrine of qualified immunity protects government

officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Here, it is difficult to imagine a less clear constitutional violation. In light of the governing law described above, no reasonable officer would have believed that McDonough's calm, measured tone and relatively innocuous questions constituted a "conscience-shocking" interrogation. During the litigation Michael described McDonough as "an affable, friendly sounding man" who "referred to Michael as 'son.'" (4 JER 768-73 [answers to contention interrogatories].) This is at the opposite end of the spectrum from the credible threats of harm that characterize the handful of cases finding solely verbal conduct to be conscience-shocking.

While McDonough's interview of Aaron was longer and more persistent than that of Michael, it did not approach the brutality necessary to trigger the constitutional standard. Again, McDonough maintained a calm, even tone and never threatened Aaron with any kind of harm. Although the interview was longer than that of Michael, McDonough's persistence makes sense in context. *See Lewis*, 523 U.S. at 850 ("Deliberate indifference that shocks in one environment may not be so patently egregious in another."). McDonough had just heard Joshua Treadway *voluntarily* explain how Aaron had planned the murder, stabbed Stephanie to death, and then

threatened to kill Josh's entire family if anyone ever found out. (*See* App. 30, 205-206, 256-57, 261 [district court finds Joshua's statements voluntary].) Any reasonable police officer would have followed up with Aaron to attempt to corroborate Joshua's story.

Given the facts of this case and the uniformity of the case law establishing stringent standards for when solely verbal conduct shocks the conscience, it would not be foreseeable to a reasonable officer that the interrogation techniques that McDonough employed, even as to minors, would subsequently be deemed constitutionally improper. Accordingly, McDonough is entitled to qualified immunity.

IV. REVIEW IS NECESSARY TO RESOLVE THE CIRCUIT CONFLICT CREATED BY THE NINTH CIRCUIT'S REJECTION OF THE "SHOCKS THE CONSCIENCE" STANDARD AS TO FOURTEENTH AMENDMENT CLAIMS FOR DEPRIVATION OF FAMILIAL RELATIONSHIP.

The Court was unequivocal in *Lewis*, 523 U.S. 833: *All* Fourteenth Amendment substantive due process claims are subject to the "shocks the conscience" standard. *See id.* at 846-9 & n.8 ("in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience").

Yet here, remarkably, the Ninth Circuit has expressly rejected the "shocks the conscience" standard that has long been the threshold requirement for all Fourteenth Amendment violations. The Ninth Circuit held: "Defendants argue that the correct standard is whether defendants' conduct 'shocked the conscience.' There is no support in the relevant case law for this assertion. The standard for deprivation of familial companionship is 'unwarranted interference,' not conduct which 'shocks the conscience.'" (App. 70 n.23.)

With this holding, the Ninth Circuit has upset the clear standard this Court has created for all Fourteenth Amendment violations, carving out a special rule for substantive due process claims alleging deprivation of a familial relationship. There is no justification for the Ninth Circuit's action.

In fact, other opinions from the circuit courts – and even prior opinions from the Ninth Circuit – have regularly applied the "shocks the conscience" standard to claims of deprivation of familial companionship. For example, in *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010), the Ninth Circuit held: "This circuit has recognized that parents have a Fourteenth Amendment liberty interest in the companionship and society of their children. Official conduct that 'shocks the conscience' in depriving parents of that interest is cognizable as a violation of due process." *Id.* at 554 (internal citations omitted; holding that officer shooting did not violate victim's family's liberty interest in his companionship because officer had no

purpose to harm victim apart from legitimate law enforcement objectives); *Griffin v. Strong*, 983 F.2d 1544, 1548-49 (10th Cir. 1993) (finding no violation of familial right of association where the alleged intrusion – falsely telling plaintiff that her husband had confessed to abusing their child and encouraging her to start her life over – did not involve physical coercion or conduct that shocks the conscience).

The Court should grant review to bring the Ninth Circuit in line with *Lewis* and with the other circuits that have held that the "shocks the conscience" standard governs *all* substantive due process claims. The issue is critical because any detention of a minor – by police, social services or any other agency – raises the specter of a deprivation of familial companionship claim. It is essential that the Court resolve the conflict and eliminate the confusion wrought by the Ninth Circuit's opinion.

CONCLUSION

For the foregoing reasons, petitioner urges that the petition be granted.

DATED: September 16, 2010

Respectfully submitted,

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In The
Supreme Court of the United States

MARK WRISLEY, et al.,

Petitioners,

vs.

MICHAEL CROWE, et al.,

Respondents.

CHRISTOPHER MCDONOUGH,

Petitioner,

vs.

MICHAEL CROWE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

COMBINED BRIEF IN OPPOSITION TO PETITIONS OF MARK WRISLEY, ET AL., AND CHRISTOPHER MCDONOUGH

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PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Respondents, and Plaintiffs below, are individuals Michael Crowe, Stephen Crowe, Cheryl Crowe, Shannon Crowe, and Judith Ann Kennedy (deceased) (the "Crowe" Respondents).

Additional Respondents and Plaintiffs below are Margaret Susan Houser, Gregg Houser, and Aaron Houser. The Houser Respondents are represented by separate counsel and intend to file their own separate opposition to the Petitioners' petitions.

Petitioner, and Defendant below, is individual Christopher McDonough.

Additional Defendants below, who filed a separate petition, are individuals Mark Wrisley, Barry Sweeney, Ralph Claytor, and Phil Anderson (collectively, the "Escondido Defendants").

Petitioner Lawrence Blum, Ph.D., has settled his case with the Crowe Respondents, and the Crowe Respondents are not filing a brief in opposition to Blum's petition.

Other Defendants below, who were dismissed from the case but named in the caption on appeal, are City of Oceanside, City of Escondido, County of San Diego, Summer Stephan, Gary Hoover, Rick Bass and the National Institute for Truth Verification, a Florida limited liability company.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT – Continued

Additional Plaintiffs below, who were dismissed from the case but named in the caption on appeal, are individuals Zachary Treadway, Joshua David Treadway, Michael Lee Treadway, Tammy Treadway, Janet Haskell, and Christine Huff.

There are no corporations involved in this proceeding.

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I.

INTRODUCTION

In 1998, fourteen-year-old Michael Crowe was coerced by members of the Escondido Police Department[1] into confessing to the murder of his twelve-year-old sister, Stephanie. In fact, Michael was innocent. Pet. App. 9 and 33. The interrogations spanned four days, during which Michael was completely isolated from his parents because, without reasonable cause, police claimed they believed Michael and his sister Shannon were in danger of immediate physical abuse. Pet. App. 190. Michael was vulnerable. He loved Stephanie (20JER4899[2]) and had seen his sister, blood soaked, dead. 20JER4831.

When Michael begged the police to let him see his family, they falsely told him his family hated him because they had seen all the evidence showing he killed Stephanie, never wanted to see him again, and that they were the only friends he had. 43JER10363 ¶ 26.

The last two interrogations were videotaped. The tapes provide an irrefutable record of the psychological torture Michael endured at the hands of his tormentors. The interrogation of Michael Crowe

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[1] The City of Escondido is thirty miles north-east of San Diego, California.

[2] "JER" references are to the volume and page of the Joint Excerpted Record that was before the Ninth Circuit in deciding this case.

received world-wide attention. Amnesty International featured it in a cover story of *Amnesty Now* on coerced confessions. 43JER10551. It received national attention. It was the subject of a full length television movie (*The Interrogation of Michael Crowe*) and an hour long story on the CBS News program *48 Hours*. 43JER10551.

The videotapes and transcripts of Michael's interrogations were part of the record on appeal. The record was reviewed *de novo* by the Ninth Circuit. Testimony of experts and non-experts was also part of the record. An expert in coerced confessions testified the interrogation was the "most psychologically brutal interrogation and tortured confession that I have ever observed." The Director of Child Psychiatry Residence Training Program at U.C.S.D. characterized it as "the most extreme form of emotional child abuse that I have ever observed in my nearly forty years of observing and working with children and adolescents." A former Justice on a California Court of Appeal with extensive prosecutorial experience testified Michael's statements were the product of a "coercive police scheme." A juror in the real killer's trial described Michael's interrogation as "brutal and inhumane" and "psychological torture." Pet. App. 46-47.

The Ninth Circuit said the tapes showed Michael was cajoled, threatened, lied to, and relentlessly pressured by teams of police officers, and concluded: "'Psychological torture' is not an inapt description." Pet. App. 47.

The "coercive police scheme" will be briefly summarized. The Lieutenant (Bass) and Sergeant (Anderson) in charge of the investigation assembled a team. Dr. Lawrence Blum,[3] a psychologist, was hired to come up with an overall plan and teach the interrogators. *See* generally, Pet. App. 66. Lead Detective Ralph Claytor and Detective Mark Wrisley played the roles of bad cop (Claytor) and good cop (Wrisley). Oceanside Police detective Chris McDonough was brought in from a neighboring agency to administer the CVSA (Computerized Voice Stress Analyzer), a so-called lie detection machine.

Lt. Bass and Sgt. Anderson (40JER9687, 34:27-35:16) decided to use CVSA (40JER9687, 34:27-35:1; 35:15-16) even though the Department had never used it before in a criminal case (40JER9687, 34:23-26). The polygraph was standard procedure for new police hires (40JER9701, 106:6-12) and criminal suspects (40JER9686, 30:16-20). The Escondido Police Department had three polygraphers (39JER9523), two already assigned to the Crowe case (Bass [39JER9524]; Martin [40JER9686, 32:3-8]). Anderson requested the CVSA, but could not remember why (40JER9701, 107:24-108:1). Even though he had never seen it used and did not know if it detected truth or deception (40JER9701, 107:6-16), he contacted Oceanside Police detective and CVSA operator Chris McDonough

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[3] During the pendency of the Petitions for Writ of Certiorari, Dr. Blum settled with the Crowe plaintiffs.

(40JER9702, 109:7-15), but did not remember if he asked him if the CVSA was reliable (40JER9702, 109:21-110:2). Anderson did not even remember if he *cared* if it was reliable. 40JER9702, 110:4-5.

Claytor and Wrisley at times worked together, at others, alone. Team members monitored proceedings on closed circuit television in another room. Claytor and Wrisley falsely told Michael they had irrefutable physical evidence of his guilt. Among other things, they told him his hair was found in Stephanie's hand (21JER4968), her blood was found in his room (21JER5018), her blood had been washed down the bathroom sink (21JER4979), and all the doors and windows were locked. 21JER4960. They told him, "So, it's either Shannon, or it's your grandma, or it's your mom, or it's your dad, or it's you." 21JER5117.

McDonough presented himself as an outside, objective party brought in to verify Michael's story (20JER4864) by a machine so accurate it was "spy stuff . . . controlled by the government for a long time." 20JER4865. McDonough's representations were false. 41JER9901-02. Since 1966, Department of Defense and other studies available in the public domain showed the CVSA did not work. 41JER9902.[4]

McDonough told Michael his subconscious mind might be blocking what he did, which explained why

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[4] During the pendency of this case, the manufacturer of the CVSA settled with the Crowes.

he could not remember committing the murder. After McDonough exited, Claytor and Wrisley appeared, emphasizing the irrefutable physical evidence proving Michael's guilt. McDonough's blocking suggestion and Claytor and Wrisley's irrefutable proof caused Michael to doubt his own memory. He was told there were two Michael's, a good Michael and a bad Michael. Pet. App. 21. Michael was told they wanted to bring out the bad Michael so they could "help" by getting the bad Michael treatment. Pet. App. 32. Michael was repeatedly told he wasn't a bad person and they wanted to help him. Pet. App. 16.

Michael was told there were two paths, one leading to prison and punishment, the other to treatment and rehabilitation. 21JER5140. If Michael wanted to take the right path he had to show he was sorry by confessing. 21JER5140.

Prodded by questions, Michael described his sister in tender terms ("she loved God," 21JER5083) and then was told to write a letter of apology to her for murdering her. 17JER4011-212.

The letter writing ploy failed because it did not provide details about how the murder was committed. Michael said he wanted to take the right path but since he did not know what happened, he would have to lie. "Let's try that" Claytor responded. 37JER8988. Michael warned what he was going to say would be a complete lie. Claytor replied: "Tell us the story." 37JER9008.

What Michael did not know was the police had a motive to make the murder an inside job. It is undisputed that Stephanie was stabbed to death in her bedroom between 10 and 11 p.m. on January 20, 1998. In the preceding three hours, residents in the immediate vicinity (a remote, rural area) of the Crowe house reported a prowler on both sides of the street. Police were dispatched twice in response to 911 calls. Officer Scott Walters responded to a 911 call made at 9:28 p.m. (39JER9430) by the Crowe's neighbor, Reverend West. West waited for the police to arrive, but no one did. 29JER6917. Shortly before 9:56 (*Crowe* at 417), Walters was on the Crowe end of a common driveway West shared with the Crowe house. Walters squad car was lit up: alley lights, high beams, spotlight, take-down lights (9JER2030-2031). Walter saw a door almost completely open (29JER6933), a light was on inside (29JER6934), but no one standing at the door (29JER6934). Then, according to Walters, the door closed "normally." 29JER6935.

Seeing nothing "unusual" (39JER9464, 49:23), Walters reported the prowler "gone on arrival" (39JER9464, 50:2-5), took himself out of service and headed to town for dinner. 29JER6937. Within the

hour, perhaps within moments, Stephanie Crowe was stabbed to death.[5]

Excessive and unwarranted police behavior was not confined to Michael. Family members were taken to the station and told they had to strip and be photographed. Father Stephen was photographed front, back and side completely nude, mother Cheryl without her underwear, and ten-year old Shannon wearing only panties. Pet. App. 12.

After taking Michael and Shannon from them, Stephen and Cheryl were told they were free to leave. When they tried to, police confronted them at the front door, shouting for them to get back inside. Detective Wrisley did so while pointing a gun at them. Pet. App. 65.

The effect of what the Ninth Circuit said could be aptly described as psychological torture is plainly visible on the videotape. Michael cries out, writhes, contorts, weeps, and expresses pain. When Claytor asked what the greatest fear he can imagine was, Michael replied: "I'm afraid there is someone else inside of me." 37JER8919.

Michael's confession was used before the grand jury, which indicted him for murder. The transcript of this proceeding was entitled *The People of the State of*

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[5] "It is undisputed Stephanie died between 10 and 11 pm." (303 F.Supp.2d 1050 at 1058). Walters was eating at Spires Restaurant from 10:10 to 10:42. (29JER6937).

California v. Michael Stephan Crowe and bears criminal case number SCD 130983. 42JER10266. Michael's confession was also used at a 707 hearing[6] in order to convince a Superior Court judge that he should be tried as an adult.

Shortly before trial, an independent forensic laboratory examined the shirt of Richard Tuite, the prowler whom neighbors reported seeing in the Crowes' neighborhood the night of the murder. His shirt had been collected as part of the initial investigation, but never fully tested. Pet. App. 9. Blood was found and positively identified as Stephanie's by DNA. Pet. App. 9.

The criminal case was dismissed without prejudice. The Escondido Police Department continued its investigation, but on February 5, 2000, San Diego County Sheriffs Homicide took over. After a two year investigation, Tuite was arrested (May 26th, 2004) for Stephanie's murder. The California Attorney General prosecuted the case after the San Diego County District Attorney stepped aside. Tuite was found guilty of voluntary manslaughter by a jury on May 26, 2004 and sentenced to thirteen years in prison. His earliest parole date is February 23, 2017.

Six years elapsed from the date the civil complaint was filed by the Crowes until the District

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[6] A 707 Hearing is held to determine whether a minor should be tried in juvenile or adult court. *See Cal. Welf. & Inst. Code* § 707.

Court issued its ruling on qualified immunity adverse to the Crowes. Another five years elapsed from the time the Crowes were allowed to file a notice of appeal with the Ninth Circuit, until the Ninth Circuit issued its opinion. Eleven years after filing the complaint, this case has not moved beyond the qualified immunity stage.

The purpose of qualified immunity is the speedy resolution of suits against government officials for the alleged violation of constitutional rights. Its goal is to assure that government officials are free to go about their duties without being hindered by the time, worry, and expense of defending lawsuits.

Twelve years after Stephanie's murder, and eleven years after seeking redress under § 1983 in federal court, the issue of qualified immunity has not yet been finally resolved. At the rate this case is going, Tuite may be out of jail before this case is concluded.

II.

ISSUES PRESENTED

Three Petitions have been filed: (1) Escondido (Claytor, et al.), (2) Oceanside (McDonough) and (3) Blum. The Crowes do not respond to the Blum Petition because he settled with the Crowes while his Petition was pending. The Escondido and Oceanside Petitions essentially raise three issues:

1. Whether compelling reasons (required by Supreme Court Rule 10) have been shown to grant a

Petition where Petitioners claim it was not clearly established in December of 1999 that it was a violation of the Fifth Amendment to coerce a confession from an innocent fourteen-year-old boy and use it against him during different phases of his criminal case, including before a grand jury to obtain an indictment for murder, before a court to persuade it to order him to be tried as an adult, and by placing information in the court file showing he had confessed, which court file judges making determinations about bail were required to consult.[7]

2. Whether compelling reasons have been shown to grant a Petition where Petitioners claim it was not clearly established in December of 1999 that it was a violation of the Fourteenth Amendment to psychologically torture an innocent fourteen-year-old boy into falsely confessing to the murder of his sister.

3. Whether compelling reasons have been shown to grant a Petition where Petitioner's claim the test for interference with the Fourteenth Amendments right to be free from governmental interference with a familial relationship is that it must "shock the conscience" rather than constitute "unwarranted interference."

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[7] California law requires that a minor be released within forty-eight hours of arrest unless a petition is filed explaining why he should be declared a ward of the court. *See Cal. Welf. & Inst. Code* § 631. The petition filed with the court said Michael admitted killing his sister. 42JER10089.

III.

ARGUMENT

A. Compelling Reasons Do Not Exist on the Fifth Amendment Issue

Petitioners claim the Supreme Court's ruling in *Chavez v. Martinez* 583 U.S. 760 (2003) created confusion about whether the Fifth Amendment's implicit "use" requirement was satisfied only when introduced against the suspect at his trial or whether "criminal case" included pre-trial judicial proceedings.

Six cases are cited as evidence of a conflict. On the one hand, Petitioners assert, the Second (*Higazy*),[8] Seventh (*Sornberger*),[9] and Ninth (*Stoot*)[10] Circuits have held use at trial is *not* required, merely use in judicial pre-trial proceedings, while the Third (*Renda*),[11] Fourth (*Burrell*),[12] and Fifth (*Murray*) Circuits[13] hold use at trial *is* required. Petition, pps. 12-13.

Renda, *Burrell* and *Murray* do not show a conflict in the Circuits because none decide whether "use" in a "criminal case" is required. The only issue decided

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[8] *Higazy v. Templeton*, 505 F.3d 161 (2nd Cir. 2007).

[9] *Sornberger v. City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006).

[10] *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009).

[11] *Renda v. King*, 347 F.3d 550 (3rd Cir. 2003).

[12] *Burrell v. Virginia*, 396 F.3d 508 (4th Cir. 2005).

[13] *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005).

in *Renda* was whether the mere failure to give a *Miranda* warning would support a later civil rights claim under § 1983. *Renda* holds it would not. Everything said about "use" and "criminal case" in *Renda* is *dicta*.

Renda lived with her boyfriend, Sonafelt, a state trooper. They had an argument, she left. The police were called, two state troopers investigated. Renda told them Sonafelt hit her but she did not want to press charges.

Sonafelt was questioned and denied Renda's accusation. Renda was questioned again and asked to write a statement. She did, but it did not mention the battery. The state troopers later claimed when they asked about this, she admitted lying to them earlier.[14] Renda was charged with making a false statement to the police. The trial court suppressed her statement because she was not given her *Miranda* rights. The criminal case against Renda was dismissed.

Renda filed a § 1983 action. Although her original complaint alleged violations of the First, Fourth, Fifth and Fourteenth Amendments, the only claim which survived[15] sought to impose liability for failure

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[14] Renda denied this. She said she told the two state troopers she left it out of her statement because she did not want Sonafelt charged.

[15] "During the trial, the District Court dismissed the coerced interrogation claim." *Renda, supra* at 553.

to give her a *Miranda* warning.[16] The Third Circuit held the mere failure to give a *Miranda* warning would not support a cause of action under § 1983. *Renda*'s language about the use of a statement at "trial" (*see Renda* at 558, 559) is *dicta*.

The fact *Renda* was *charged* is beside the point. The issue actually decided was that a mere failure to provide a *Miranda* warning would not support a § 1983 claim. In light of the Supreme Court's later decision in *Chavez*, so holding (*Chavez* at 761), there is little chance of a conflict arising on this issue.

The only issue decided by *Burrell* was whether the issuance of summons by a police officer in the field to a motorist involved in an accident ordering him to appear in traffic court violated the Fifth Amendment. *Burrell* held it did not. *Burrell* does not involve a coerced confession. In fact, it involves the opposite – silence. Burrell refused a police officer's request to produce proof of insurance (required under state law of a motorist involved in an accident) on the ground he had a Fifth Amendment right not to incriminate himself.

The police officer served Burrell with two summonses: (1) operating an uninsured motor vehicle without paying an uninsured motorist fee, and (2) obstruction of justice. A Virginia traffic court convicted

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[16] " . . . Renda claims . . . defendants violated . . . her right under *Miranda* to be free from custodial interrogation." *Renda, supra* at 557.

Burrell of obstructing justice, but dismissed the charge of failure to maintain insurance. The charge of obstructing justice was dismissed on appeal.

Several key facts in *Burrell* are unclear. The opinion says it is not clear from the record whether Burrell's assertion of his Fifth Amendment right was used against him in traffic court. It is hard to see how Burrell could have been convicted of obstruction of justice without evidence at trial that he exercised his Fifth Amendment right to remain silent.

Burrell does not decide whether Burrell had a Fifth Amendment right to refuse the police officer's request. It does not discuss whether evidence of Burrell's exercise of his right to remain silent at trial would violate his Fifth Amendment right not to be compelled to be a witness against himself in any criminal case. It does not explain whether a traffic court has jurisdiction over crimes or only infractions, and if the offenses Burrell was charged with were infractions, whether trial on an infraction was a "criminal case."

Burrell's fact pattern presents these interesting issues, none of which were resolved. The reason: the issue decided by the Fourth Circuit was extremely narrow. Footnote 4 says:

> Unlike in *Chavez*, criminal charges *were* ultimately brought against Burrell. The record does not disclose whether the prosecution attempted to introduce evidence of Burrell's failure to respond at the trial for obstruction

> of justice or whether such evidence was in fact admitted. At oral argument, Burrell's counsel affirmed in response to the court's question that Burrell *only* claims that his constitutional rights were violated at the time the summonses were issued, not at the time of trial. *Burrell* at 513, n.4.

Hence, everything which occurred after the issuance of the summonses was irrelevant because Burrell's counsel told the Court his sole claim was that Burrell's constitutional rights had been violated at the time the summonses were issued. The only issue *Burrell* decided was that mere issuance of a summons – in effect, the equivalent of a traffic ticket – following an exercise of the right to remain silent, did not compel a person to be a witness against himself in any criminal case. Everything *Burrell* says about "trial" and "courtroom use" is *dicta*.

Significantly, *Sornberger v. City of Knoxville*, 484 F.3d 1006 (7th Cir. 2006), holding a violation of the Fifth Amendment occurred when a coerced statement was used at a probable cause hearing, bail hearing and an arraignment (*id.* at 1027), denied that its decision was in conflict with *Burrell*:

> We do not see any conflict between our holding today and that of our sister circuit in *Burrell*. There, Burrell claimed that his constitutional rights were violated when the police issued him an obstruction of justice summons for invoking his right to remain silent. The Fourth Circuit held that the issuance of a summons was not a "*courtroom use*

> of a criminal defendant's compelled, self-incriminating testimony," and therefore Burrell failed to state a claim under § 1983 for violation of his right against self-incrimination. Here, by contrast, Teresa's confession was used at a preliminary hearing to find probable cause to indict, to arraign and to set her bail. *Id.* at 1027.

Murray did involve the "use" of a confession "at trial," but its holding rested entirely on the issue of causation. *Murray* held the erroneous admission of a confession by the trial court was a superseding cause which broke the chain of causation required to impose civil liability in a later civil rights action under § 1983.

Eleven-year-old LaCresha Murray lived with her grandparents, R.L. and Shirley Murray, who also provided daycare at their home. Two-year-old Jayla was routinely cared for by the Murrays. LaCresha told R.L. that Jayla was throwing up. At around 5:00 p.m. Jayla was sweating profusely. She was pronounced dead at a hospital at about 5:30 p.m. The medical examiner concluded Jayla sustained severe liver injury as a result of a blunt force blow causing four ribs to break which split Jayla's liver in two, resulting in Jayla's death within five to fifteen minutes.

Three days later, LaCresha was in the Texas Baptist Children's Home when detectives questioned her. They did not take her to a magistrate, as required by Texas law, before questioning her because

of advice from a prosecutor that LaCresha was not in custody. However, they gave LaCresha a *Miranda* warning, then interrogated her for two hours. LaCresha admitted dropping Jayla and kicking her. She was charged with capital murder and injury to a child.

The juvenile court ruled her confession admissible, the jury convicted her of negligent homicide and injury to a child. Extensive publicity followed. The juvenile court, perhaps influenced by publicity, ordered a new trial on its own motion. LaCresha was charged with injury to a child, her confession was again admitted, and a second jury convicted her. The juvenile court adjudicated her delinquent and sentenced her to twenty-five years.

The Texas Court of Appeals reversed, holding LaCresha had been in state custody and should have been taken before a magistrate before being questioned and that her confession was inadmissible.

The Fifth Circuit held the admission (though erroneous) of LaCresha's confession was an independent, superseding cause of the violation of her Fifth Amendment rights (*id.* at 290) and "[i]n this circuit, it was not well-established at the time of LaCresha's interrogation that an official's pre-trial interrogation of a suspect could subsequently expose that official to liability for violation of a suspect's Fifth Amendment rights at trial." *Id.* at 293.

In contrast, this principle *was* well established in the Ninth Circuit (Pet. App. 44). This distinguishes

Crowe from *Murray*. *Murray* was decided solely on the issue of causation. The Court found the chain of causation was broken when a trial court erroneously admitted the defendant's statements. Whether this reasoning is correct is debatable,[17] but this is beside the point, because Murray's statements were erroneously admitted by the trial court. Crowe's coerced statements were suppressed by the state criminal court. Pet. App. 31-32. *Murray* sheds no light on, and provides no precedent for, the question of whether use of LaCresha's confession in pre-trial judicial proceedings would have constituted "use" in a "criminal case." Everything *Murray* says about "trial," "at trial," "trial right" (*see Murray* at 285) "criminal case," and "at trial" is *dicta*.

In contrast *Sornberger*, *Higazy* and *Stoot*, all decided later, squarely decide the issue of "use" in any "criminal case." *Higazy* (use at a bail hearing), *Sornberger* (use to initiate criminal proceedings), *Stoot* (use to initiate criminal proceedings) and other cases[18] remain faithful to the pluralities' statement in

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[17] At common law, the future (1) event and (2) injury must both be unforeseeable to constitute a superseding cause. There are many reported cases where trial courts have erroneously admitted confessions and been reversed on appeal. Hence, at the time a suspect is being questioned it is foreseeable that his statement will be used against him, or excluded by the trial court, or erroneously admitted by the trial court.

[18] Like *Weaver v. Brenner*, 40 F.3d 527 (2nd Cir. 1994), holding use of a coerced confession before a grand jury violates the Fifth Amendment. *Id.* at 536.

Chavez that "criminal case" is a general term for "an action, cause, suit, or controversy at law . . . a question contested before a court of justice." *Chavez* at 766 citing *Blyew v. United States*, 13 Wall. 581, 595, 20 L.Ed. 638 (1872).

Sornberger, *Higazy* and *Stoot* all follow the Fifth Amendment's text and the Supreme Court's guidance in *Chavez* requiring "use" in a "criminal case." They are consistent with the historical meaning of "criminal case" at the time the Fifth Amendment was ratified. Sir James Stephen's *A History of the Criminal Law of England* shows "criminal case" referred to the entire criminal judicial process: "These are the indictment or information, the arraignment of the prisoner, and his trial down to the verdict and judgment." Stephen, *A History of the Criminal Law of England* at 273. Sir Stephen explains the "indictment is the foundation of the record in all criminal cases, and is indeed the only document connected with the trial which in all cases is in writing." *Id.* at 274. "It is enough to say that in all common cases the pleadings in a criminal trial have always consisted, and still consist, of an indictment engrossed on parchment, and a plea given of the accused person orally in open court, of guilty or not guilty." *Id.* at 275.

England's Bill of Rights (1689) shows bail was part of a criminal case: "And excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects. *English Bill of Rights*, 1689. The Judiciary Act of 1789 also shows bail was considered part of

a criminal case: "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death . . . " *The Judiciary Act of 1789*, 1 Stat. 73, Chap. XX, Section 33.[19]

Hence, "criminal case," at the time the Fifth Amendment was ratified, referred to the entire criminal judicial process up to and including sentencing, including proceedings before a grand jury. *Counselman v. Hitchcock*, 142 U.S. 547 (1892), unanimously held proceedings before a grand jury were part of a "criminal case." It has never been overruled.[20]

When a crime is committed, there is an "investigatory" and "judicial" phase. The investigatory phase involves gathering evidence, finding witnesses, and questioning suspects. The judicial phase involves presenting evidence to a grand jury, obtaining an indictment, bringing the defendant before the court, setting bail, hearing and deciding motions, trial, sentencing and appeal. When a grand jury or juvenile court receives evidence, the line has been crossed

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[19] The Fifth Amendment was ratified in 1791, two years after the Judiciary Act.

[20] Westlaw incorrectly says *Counselman* was "overruled in part" by *Kastigar v. United States*, 406 U.S. 441 (1972). Westlaw confuses what a case *holds* with what it says. *Kastigar* explains: "Our holding is consistent with the conceptual basis of *Counselman*. *Id.* at 444. Elsewhere, *Kastigar* merely says the "broad language" of *Counselman*, implying an immunity statute must afford *greater* protection than the Fifth Amendment is *dicta*. *Id.* at 444-445.

from the "investigatory" phase and has moved into the "judicial" phase. The contours of this line have been elucidated in a different but analogous context in cases like *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) and its progeny.

The holding in *Sornberger*, *Higazy*, *Stoot*, and *Crowe* are consistent with the historical meaning of "criminal case," the unanimous holding of the Supreme Court in *Counselman*, and the guidance provided by *Chavez*. *Chavez* explained that "criminal case" at the very least required initiation of legal proceedings (*id.* at 766), and was a "general term for an action, cause, suit or controversy at law" (*id.* at 766).

To the extent *Chavez* and other Supreme Court decisions use the word "trial" in connection with the Fifth Amendment's "use" requirement, it is submitted that, like "criminal case," it is being used in a general sense to refer to judicial proceedings over which a trial court has jurisdiction. *Black's Law Dictionary* defines the "trial court" as "[t]he court of original jurisdiction; the first to consider litigation. Used in contrast to appellate courts." *Black's Law Dictionary*, Fifth Edition. In California, the court exercising original jurisdiction over Michael's criminal case was the Superior Court. It was empowered to, and exercised authority over, every phase of Michael's criminal case, from grand jury, indictment, arraignment, bail, determining whether he should be tried as an adult, as well as hearing and ruling on pre-trial motions.

A grand jury is a competent tribunal (*California Penal Code* § 888) authorized by the law of the land (*id.*) to hear evidence and bring indictments (Witkin, 4 *California Criminal Law* (3d), p. 46, § 31). Grand jurors must possess specified qualifications (*id.* p. 47, § 32), are required to take an oath (*California Penal Code* § 911) and are "charged by the court" (*California Penal Code* § 914(a)) concerning their responsibilities.

The California Supreme Court has held "there is no doubt that a grand jury is part of the court by which it is convened, and that is under the control of the court . . . " *People v. Superior Court (1973 Grand Jury)*, 13 Cal.3d 430 at 438 (1975). *California Penal Code* § 888 makes clear that a grand jury acts under the authority of the judicial branch: "A grand jury is a body of the required number of persons returned from the citizens of the county before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county."

Witnesses in Michael's criminal case, bearing case number SCD 130983 (42JER10266), testified before the grand jury, which indicted him for murder. Proceedings before the grand jury were part of Michael's "criminal case" because the grand jury acted pursuant to judicial authority and was subject to judicial oversight, and the subject matter was "an action, cause, suit or controversy at law" (*Chavez* at 766).

A Superior Court judge presided over Michael's 707 hearing, the purpose of which was to decide

whether Michael should be tried as an adult. A 707 hearing is a critical phase in a criminal case. *People v. Chi Ko Wong*, 18 Cal. 3d 698, 718 (1976) held it must comport with due process:

> " . . . [T]he certification of a juvenile offender to an adult court has been accurately characterized as 'the worst punishment the juvenile system is empowered to inflict.'" (*Id.* at 810).

The Ninth Circuit's *Crowe* decision is correct. Michael's confession was used against him in a criminal case. The Ninth Circuit cited its decision in *Stoot v. City of Everett*[21] (holding when a confession was used to file criminal charges in juvenile court it constituted use in a criminal proceeding, *Stoot* at 912) to support its decision in *Crowe*. Before *Crowe* was decided by the Ninth Circuit, but after a Petition for Certiorari had been filed with the Supreme Court in *Stoot*, Escondido filed an *amicus* brief in *Stoot* (2010 WL 304259) essentially arguing the same thing it does in the instant Petition. The Supreme Court denied certiorari in *Stoot*.[22] It should deny it here as well.

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[21] *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009), cert. denied in *Jensen v. Stoot*, 130 S.Ct. 2343, 176 L.Ed.2d 577, 78 USLW 3375, 78 USLW 3576, 78 USLW 3580 (U.S. Apr. 05, 2010) (No. 09-728).

[22] *Id.*

B. Compelling Reasons Do Not Exist on the Fourteenth Amendment Issue

Petitioners claim what the police did to Michael does not shock the conscience. The videotape of his interrogation refutes this. Petitioners create the erroneous impression the District Court was in a better position to decide the Fourteenth Amendment issue than the Ninth Circuit because the District Court judge reviewed all the videotapes and transcripts of the interrogations. This ignores the fact the Ninth Circuit's review was *de novo* and it also reviewed them.

> "One need only read the transcripts of the boys' interrogations, or watch the videotapes, to understand how thoroughly the defendants' conduct in this case 'shocks the conscience' . . . 'Psychological torture' is not an inapt description." (Pet. App. 47).

The Ninth Circuit faithfully followed the Supreme Court's guidance (for example, citing *In re Gault*, 387 U.S. 1 (1967)) in finding Michael's interrogation shocked the conscience in violation of the Fourteenth Amendment.

In addition to the videotapes of the interrogations, the Ninth Circuit also had before it the testimony of lay and expert witnesses who described the interrogation as "psychologically brutal," "tortured," "extreme . . . emotional child abuse" the product of a "coercive police scheme," "brutal," "inhumane," and "psychological torture."

The Ninth Circuit's decision was unanimous, one of the panel members had extensive experience as a prosecutor,[23] and a motion for re-hearing was denied *en banc*. The Ninth Circuit followed the proper legal standard in finding Michael's interrogation violated the Fourteenth Amendment.

C. Compelling Reasons Do Not Exist on the Legal Standard Used for Interference with Familial Relations

The Ninth Circuit used the correct legal standard ("unwarranted interference" Pet. App. 70) for interference with family relations and the Petition does not show compelling reasons to grant certiorari to decide this question.

IV.

CONCLUSION

Eleven years after the Crowes filed their § 1983 civil rights action, the issue of qualified immunity has not yet been finally resolved because Petitioners are asking the Supreme Court to grant Certiorari from the decision of the Ninth Circuit. In this time span,

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[23] As Chief of the Los Angeles County District Attorney's Office, United States Attorney for the Central District of California, Assistant Attorney General in the Criminal Division of the U.S. Department of Justice, and Associate Attorney General. *Federal Judicial Center*, Trott, Stephen S.

the trial judge, a plaintiff (Mrs. Kennedy), and a plaintiff's expert witness (Justice Puglia) have died.

The Crowes recognize that government officials, discharging their duties in good faith, should not have to be constantly looking over their shoulders or distracted by time consuming, expensive, and emotionally draining litigation.

However, the Crowes urge that the maxim "Justice delayed is justice denied" should be more than a platitude. The time, expense, and emotional toll of litigation affects them as well. While they recognize qualified immunity serves an important societal purpose, they contend some consideration should be given to them.

More than a decade has passed since the Crowes filed their case. The record before the Ninth Circuit was extensive, carefully considered, and thoroughly reviewed. The Ninth Circuit's decision faithfully followed Supreme Court precedent. There is no conflict in the Circuits on the issues decided in *Crowe*; in fact, there is uniformity in the Circuits on those issues. *Crowe* adheres to the historical meaning of "criminal case" and Supreme Court precedent, like *Counselman*. It is consistent with the historical understanding of "criminal case" reflected in England's Bill of Rights (1689) and the Judiciary Act of 1789. The record provided ample evidence for the Ninth Circuit to hold that the interrogation of Michael Crowe shocked the conscience in violation of the Fourteenth Amendment.

Petitioners have had ample opportunity to make their case for qualified immunity. The time has come to allow the Crowes to make their case on the merits to a jury.

Respectfully submitted,

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In The
Supreme Court of the United States

MARK WRISLEY, *et al.*,

Petitioners,

v.

MICHAEL CROWE, *et al.*,

Respondents.

CHRISTOPHER McDONOUGH,

Petitioner,

v.

MICHAEL CROWE, *et al.*,

Respondents.

LAWRENCE N. BLUM,

Petitioner,

v.

MICHAEL CROWE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

Whether Petitioners have presented compelling reasons to grant the petitions, where the Ninth Circuit Court of Appeals correctly held on the record before it that:

1. Use of confessions coerced from juveniles and later introduced in pre-trial proceedings during the course of the "criminal case" violate the Fifth Amendment right against self-incrimination;

2. A police conspiracy to intentionally violate a juvenile's Constitutional rights, with the aim of coercing a confession no matter the human toll, sufficiently "shocks the conscience" to support a violation of the Fourteenth Amendment's due process protections;

3. A clinical psychologist, retained by police to devise strategies and techniques to "psychologically break" juvenile criminal suspects during coercive interrogations, may be held liable for conspiracy to violate those juveniles' constitutional rights.

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I. INTRODUCTION

There is a climactic scene in the beloved movie classic, *The Wizard of Oz*, where Dorothy and her cohorts return to the Emerald City for an audience with a powerful Wizard who has promised to deliver Dorothy to Kansas, a brain to the Scarecrow, a heart to the Tin Woodsman, and bravery to the Cowardly Lion. When they finally come face to face with the Mighty Oz, the apparition blusters, telling them not to invoke his wrath and to go away. Just then however, Dorothy's dog Toto pulls aside a curtain, revealing nothing more than a slight man operating levers that have only created the illusion of the Wizard. In that unguarded moment, the Mighty Oz admonishes them to "pay no attention to the man behind the curtain," but is ultimately forced to admit that he is little more than a balloonist from Kansas.

Like the Mighty Oz, Petitioners have attempted in their respective petitions to mystify this Court with the look and feel of great erudition, while concealing the humble reality that those petitions present nothing that has not already been decided by this Court and uniformly followed by the Circuit Courts of Appeal. Petitioners also urge this Court to pay no attention to what lies behind their curtain of rhetoric and hyperbole, but Respondents pull it back here to: (A) clarify that no conflict exists among the Circuit Courts which have actually decided the issue confronted by the Ninth Circuit here – the use of coerced confessions in pre-trial proceedings within the "criminal case" after charges have been filed;

(B) illuminate how psychological torture, leveled against 14- and 15-year-old boys, has long been regarded as the basis for a Fourteenth Amendment due process violation; and (C) explain how uniform authority holds that private actors who assist in violating the constitutional rights of others may be held liable for conspiracy. In doing so, Respondents remind this Court of its own relevant decisions and the consistent decisions of the Circuit Courts, all of which demonstrate why review is not warranted here. Accordingly, Respondents urge this Court to deny review in this case where, like that balloonist from Kansas, Petitioners' respective petitions are viewed by this Court for what they really are, and not what Petitioners have projected them to be.

II. STATEMENT OF THE CASE

For well over a half century – and in two seminal decisions, *Haley v. State of Ohio,* 332 U.S. 596 (1948) and *In re: Gault,* 387 U.S. 1 (1967) – this Court has recognized that juveniles subjected to the strain of custodial police interrogations are "easy victims of the law" and as such, "cannot be judged by the more exacting standards of maturity." It has done so reasoning "that which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." And it is for that very reason that this Court recognized why "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children."

Consequently, this Court has mandated that the police must exercise "the greatest care" in their interrogations of juveniles – not only to assure that any admissions are not coerced – but also to guarantee that they are "not the product of ignorance of rights, or of adolescent fantasy, fright or despair." Similarly, it has instructed reviewing courts to take "special care" in scrutinizing the record where a juvenile's confession is at issue, especially where the totality of circumstances suggest that the minor is "no match for the police in such a contest."

This case poignantly illustrates the reasons for the Court's concern. Indeed, this case is the tragic tale of the police investigation of the murder of 11-year-old Stephanie Crowe, who was viciously stabbed to death in her bedroom by Richard Tuite, a schizophrenic transient with a history of drug use and violent crime. Within a few short hours leading up to that murder, Tuite had been menacing an otherwise quiet neighborhood in rural Escondido, California, in his search for "Tracy," an old girlfriend. His activities understandably prompted several 911 calls to local police officials from anxious neighbors complaining about Tuite's bizarre behavior and attempts to enter their homes looking for "Tracy."

When those police officials finally responded in the late evening hours, they knew Tuite was last seen banging on the door of a home adjacent to where Stephanie Crowe lived. Approaching that location with all lights on his patrol car ablaze, the lone police officer sent to the scene saw a side door to Stephanie's

house inexplicably close as he approached. But without investigating further, that officer turned around, concluded that Tuite was simply "gone on arrival," and then took himself out of service so he could eat dinner.

Having so easily evaded that police officer, Tuite made his way through Stephanie's house and into her bedroom, finally finding someone he believed resembled "Tracy." Tuite then fatally stabbed Stephanie in her bedroom, where she was found slain by her horrified family.

Called to investigate in the morning, the police instantly seized upon a flawed theory that this hideous crime had been committed by a member of Stephanie's family, and not by Tuite. Using a ploy to separate Stephanie's brother and sister from their parents, the police instantly began hammering on Stephanie's 14-year-old brother, Michael Crowe, as their lead suspect. In brazen violation of Michael's rights, the police subjected Michael to prolonged, coerced interrogations, deliberately disregarding his repeated requests to see his parents, to stop the interrogations, and to use the bathroom or to sleep. Enlisting the aid of a clinical psychologist and a "truth box" voice analyzing machine which they knew was merely a sham instrument meant to intimidate and "psychologically break" Michael, the police ultimately wore Michael down, convincing him that he had some sort of pent-up hate of Stephanie that caused him to "black out" and kill her without realizing it.

Yet even after coercing that confession, the police still had a problem. While the evidence continued to point strongly to Tuite as Stephanie's murderer, no physical evidence linked Michael to the crime. Ignoring Tuite, the police cast a dragnet over two of Michael's friends, Joshua Treadway and Aaron Houser (also juveniles), accusing them of being accomplices and co-conspirators. In what one expert would later characterize as "the most extreme form of emotional child abuse that I have ever observed in my nearly 40 years of observing and working with children and adolescents," the police employed the same coercive interrogation techniques to Joshua and Aaron, not to learn or discover the truth, but to browbeat, deceive, threaten and – by any means necessary – coerce them into admitting to their preconceived and factually unsupported theory of how Stephanie was murdered, no matter how strongly the actual evidence pointed toward Tuite.

However, when blood evidence from Tuite's clothing (ignored by the police for a year) was later confirmed to be Stephanie's, charges against Michael, Joshua and Aaron were reluctantly dropped, and Tuite was prosecuted for, and ultimately convicted of, Stephanie's murder. Consequently, Michael, Joshua and Aaron filed suit against the police and related entities, alleging that their civil rights had been repeatedly and intentionally violated by the police to support a ridiculous "theory-based" investigation, and in a concerted effort to provide "cover" for one of their

own who had the last, best chance to stop Tuite, but never even attempted to do so.

While the District Court granted the police summary judgment by measuring their behavior as if they had been dealing with hardened adult criminal suspects, the Ninth Circuit reversed, finding on *de novo* review that "[o]ne need only read the transcripts of the boys' interrogations, or watch the videotapes, to understand how thoroughly the defendants' conduct in this case 'shocks the conscience.'" (App. 47.)[1] The Ninth Circuit further held that use of those coerced confessions at various pre-trial hearings – but after charges had been brought against the boys and the "criminal case" commenced – violated their Fifth Amendment right against self-incrimination. (App. 36-45.)

In an attempt to induce this Court's review, Petitioners have offered a highly glossed and sanitized version of the underlying facts. *But it is the unique and compelling facts of this case which make it a particularly unsuitable vehicle for review on the multiple issues raised by Petitioners.* Thus, as Rule 15.2 requires Respondents to point out to the Court any perceived misstatements of fact contained in the underlying petitions, Respondents focus here on the

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[1] All factual references in this Opposition Brief are made to the Appendix of documents attached to the Petition of Mark Wrisley, Barry Sweeney, Ralph Clayton, and Phillip Anderson ("the Escondido Petitioners"), and are abbreviated as: "(App. [page].)"

insufficiencies in that recitation, citing to the underlying opinions of the Ninth Circuit and the District Court.

A. Summary.

In his separate Opposition Brief, Co-Respondent, Michael Crowe, describes in detail the facts leading up to Tuite's murder of Stephanie, how the circumstantial and physical evidence strongly implicated Tuite from the outset of the investigation, and how no physical evidence whatsoever tied Michael to the murder of his sister. Thus, for the sake of brevity, a full recounting of those facts and circumstances will not be repeated here.

Suffice it to say, however, that within minutes of arriving at the scene, the Escondido police officers investigating Stephanie's murder conspired to pin that hideous crime on a family member, and Michael unfortunately became their target. The problem with that plan was that notwithstanding their ability to "psychologically break" Michael and to coerce a confession from him, *the police could find no physical evidence (including a murder weapon) linking Michael to that crime*. Thus, to justify their own mistreatment of Michael, the investigating officers further conspired to search, arrest and interrogate two of Michael's friends, Joshua Treadway and Aaron Houser, all with the goal of further knuckling under those juveniles to support their "theory-based"

investigation, even as the objective evidence increasingly pointed to Tuite.

B. January 22, 1998: The Police Interrogate Aaron Houser at His Home.

On January 22, 1998, Petitioners first interrogated Aaron at his residence. (App. 25.) They initially questioned Aaron regarding his relationship with Michael, and his interest in mystical fantasy games and medieval weapons. (*Id.*) Although those questions were clearly intended to elicit incriminating responses from Aaron, the police never warned Aaron (then a 14-year-old with no prior criminal record) of his *Miranda* rights. (*Id.*)

C. January 27, 1998: The Police Interrogate Aaron Houser Again at His Home and at the Escondido Police Department.

On January 27, 1998, Petitioners executed a search warrant at Aaron's residence, based primarily on prior statements they elicited from him. (App. 25.) During that search, Aaron was confined to his living room and kitchen, except when brought to his bedroom to answer questions. Aaron was then taken to the Escondido police station for further questioning, which lasted nearly two hours. (*Id.*) Again, those interrogations were clearly intended to elicit incriminating responses and were even videotaped for that

purpose, but at no time was Aaron advised of his Fifth Amendment rights. (*Id.*)

D. January 27, 1998 to January 28, 1998: The Police Interrogate Joshua Treadway For 13 Hours Overnight.

At approximately 7:00 p.m. on January 27, 1998, the Escondido Police began their first grueling interrogation of Joshua, lasting over 13 hours. (App. 29-30.) To begin, Claytor questioned Joshua for several hours, employing various techniques outlined for him by psychologist, Lawrence Blum, meant to coerce Joshua into admitting involvement in a crime that neither he, nor his friends, committed. (*Id.*) Specifically, Claytor baited Joshua with promises of leniency (rehabilitation) and then scared him with threats of punishment (prison). (*Id.*) He also denied Joshua's request to see his mother, denied his request for water, and refused to take him to the bathroom. (*Id.*) Claytor never advised Joshua of his Fifth Amendment rights. (*Id.*)

As Joshua began to show visible signs of strain following Claytor's, Wrisley's and Sweeney's seven hours of grilling, McDonough strategically took over Joshua's interrogation at 3:00 a.m. on January 28, 1998, consistent with the plan the officers and Blum had previously devised to "break" Joshua. (*Id.*) It was at this time that McDonough turned loose on Joshua the "truth box" Computer Voice Stress Analyzer ("CVSA") device. (*Id.*) Notably, McDonough would

later admit he did not know how or if the CVSA worked, but told Joshua in no uncertain terms that the CVSA was "97% accurate," and immediately determines if your answer is right or wrong.

Despite McDonough's onslaught and deception, Joshua initially maintained his innocence. (App. 30.) However, McDonough relentlessly interrogated and psychologically abused Joshua, utilizing the CVSA as the tool of that coercion. Joshua was exhausted and repeatedly asked to be allowed to sleep. (*Id.*) When Joshua ultimately broke down and falsely told McDonough that Aaron gave him the knife used to kill Stephanie -- *the only story Joshua discerned would allow him to escape further coercion* – McDonough pretended to administer another CVSA exam, telling Joshua that he had now "passed" the test. (*Id.*) Yet at no time during over 13 hours of interrogation did McDonough "*Mirandize*" Joshua Treadway. (*Id.*)

E. The Ruse Phone Call to Aaron.

Having "cracked" 15-year-old Joshua, Claytor and Anderson further manipulated Joshua in an unconscionable attempt to obtain a false confession from Aaron. Specifically, they goaded Joshua to call Aaron and to accuse him of complicity in Stephanie's murder while they secretly listened to that phone call. (App. 30.) Aaron, however, denied any involvement, and was emotionally shocked, confused and frightened by that ruse. (*Id.*)

F. February 10, 1998: The Police Interrogate Joshua For Another 12 Hours.

Having already succeeded in extracting a false story from Joshua that Aaron gave him the knife Michael used to kill Stephanie, McDonough, Claytor and other officers pushed their plan further, deciding to bring Joshua back for another interrogation on February 10, 1998. (App. 30.)

Knowing that Joshua was already vulnerable to their influence and that they could now manipulate Joshua to follow their preconceived script, McDonough and Claytor interrogated Joshua for another 12 hours. (*Id.*) With direction and assistance from Blum, Claytor and McDonough used similar coercive techniques to those utilized on January 28, 1998, with similar results. By the end of that interrogation session, they had Joshua fabricate a fantasy confession in which Aaron stabbed Stephanie with Michael Crowe's help, while he (Joshua) acted as the "lookout." (*Id.*)

Notably, that false confession was so meandering and internally inconsistent – with key facts changing every few moments – that even McDonough doubted it to be true. (*Id.*) Yet this did not deter the officers from arresting Joshua at the conclusion of this second interrogation, *reading him his Miranda rights for the first time*, and booking him into San Diego County Juvenile Hall. (*Id.*)

G. February 11, 1998: The Police Arrest Aaron at School, Search His Locker and Home, and Interrogate Him For a Third Time.

Using Joshua's false confession of February 10, 1998, as "probable cause," the following day the police searched Aaron's home and his school locker, while they seized Aaron at his school without telling him he was under arrest. (App. 25.)

After Aaron was brought from school to the Escondido Police Department, he was interrogated for a total of nine and one-half hours, primarily by McDonough. (*Id.*) As with Michael and Joshua, McDonough's interrogation of Aaron was psychologically grueling, was based on coercive techniques and strategies tailored by Blum to overtake Aaron's will and to force a false confession, and was justified by Blum telling the officers that Aaron was "a Charles Manson wannabe" and "Charles Manson with an I.Q." (App. 26, 77.) Aaron was also interrogated under false pretenses in that neither he nor his parents were told that Joshua had implicated him in the murder, or that Aaron was even a suspect. (App. 26-28.) As such, Aaron was under the false impression that he was merely assisting the police in their investigation of Michael. (*Id.*)

As with Joshua, McDonough repeatedly deceived Aaron in his attempts to extract a confession. For example, during the interrogation, McDonough asked Aaron to describe "hypothetically" how Michael might

kill Stephanie, how Joshua might, and how Aaron might do so. (*Id.*) To accomplish that goal, McDonough used the CVSA device to "condition" and "suggest" Aaron's responses. (*Id.*) But not only was Aaron's hypothetical description at odds with the evidence of how the killing actually took place, it was completely different from Joshua's fabricated scenario, which also did not match the evidence. Nevertheless, McDonough told Aaron that the CVSA indicated that he was "definitely involved" and that Petitioners had physical evidence against him and would soon uncover more. (*Id.*) McDonough continued that deception by also telling Aaron that Michael and Joshua had said that Aaron helped him kill Stephanie, and that the physical evidence would implicate him. (*Id.*)

Upon realizing for the first time that he had been deceived and was being questioned as a suspect, Aaron demanded that the interrogation stop and asked to use the bathroom. Neither request was honored. (*Id.*) On two additional occasions, Aaron asked to speak with his mother, but was not permitted to do so.[2] (*Id.*) Claytor also denied Aaron the right to speak with his father. (*Id.*) On another occasion, Aaron demanded that the interrogation cease which

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[2] Under California law, a minor subject to custodial interrogation invokes his Fifth Amendment right by asking to see a parent. *People v. Burton*, 6 Cal.3d 375, 383-384 (1971). Upon such a request, before or during questioning, "the police must cease custodial interrogation immediately." *Id.* at 384.

request was likewise denied. (*Id.*) Yet after approximately 11 hours of coercive interrogation in which Aaron maintained his innocence, the police booked him into Juvenile Hall, never having properly advised him of his *Miranda* rights. He was thereafter handcuffed, photographed in the nude, and incarcerated for approximately *eight months*.

H. Use of the Boys' Statements in the Criminal Cases Against Them.

Statements obtained from the boys during their interrogations were introduced during at least three pre-trial proceedings. (App. 30-31.) First, a "*Dennis H.*" hearing was held and resulted in Aaron and Joshua spending several months in jail awaiting trial.[3] Second, the boys' statements were introduced during subsequent grand jury proceedings, resulting in indictments against all three boys for murder. Finally, the statements were used in a "707 Hearing" to determine if the boys would be tried as juveniles or adults.[4] (*Id.*)

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[3] In California, when a minor is taken into custody by a police officer, he must be released within 48 hours from the time of apprehension unless a petition is filed within that time in a court of competent jurisdiction explaining why the minor should be declared a ward of the court. See Cal. Welf. & Inst. Code § 631; see also *In re: Dennis H.*, 19 Cal.App.3d 350, 354 (1971).

[4] The California Supreme Court has characterized trying a minor as an adult as "the worst punishment the juvenile system is empowered to inflict." *Ramona R. v. Superior Court*, 37 Cal.3d

(Continued on following page)

Notably, at a subsequent suppression hearing, the state court found that most of Michael's statements were the product of a "coercive scheme" by the police and suppressed them. Similarly, the state court suppressed all of Aaron's statements on the grounds that Aaron had never been *Mirandized*, while also suppressing a large portion of Joshua's statements on the same basis. (App. 31-32.)

I. Dismissals of Indictments and Prosecution of Tuite.

After the case against the boys had been set for trial, pieces of Tuite's clothes (which had been collected but never analyzed when the police first stopped Tuite the day after Stephanie was killed) were examined, the DNA results of which revealed spots of Stephanie's blood. (App. 32-33.) The prosecution then filed a Motion to Dismiss the indictment against the boys. (*Id.*)

J. The Boys' Subsequent § 1983 Action in the District Court.

After the charges against them were dismissed, the boys and their families filed three separate complaints in state court alleging violations of 42 U.S.C.

802, 810 (1985); accord *Marcus W. v. Superior Court*, 98 Cal.App.4th 36, 45 (2002) (holding that the privilege against self-incrimination applies in "707 hearings").

§ 1983 and various state law torts. Petitioners removed the complaints to federal court. (App. 33-36.)

Following various motions to dismiss those complaints, the District Court consolidated all three actions and ordered the filing of a Joint First Amended Complaint. (*Id.*) Petitioners then brought over 10 separate motions for summary judgment, which were the subject of substantial, serial briefing in the District Court over a period of four and one-half years. (*Id.*) Prior to Tuite's trial and ultimate conviction for Stephanie's murder, the District Court issued the first of two lengthy opinions on February 17, 2004, finding in substance that Joshua's and Aaron's respective claims for violation of their Fourth, Fifth and Fourteenth Amendment rights did not survive summary judgment. (App. 197-356.)

After Tuite's conviction, the District Court on February 28, 2005 ruled on Michael's and his family's remaining civil rights claims, prompted by a second round of similar motions for summary judgment filed by Petitioners. Following the course it charted with the claims brought by Joshua and Aaron, the District Court also denied Michael any relief on his Fourth, Fifth, and Fourteenth Amendment claims. (App. 90-196.)

K. The Ninth Circuit's Ruling.

Upon *de novo* review, the Ninth Circuit reversed in part and affirmed in part the District Court's two rulings. Specifically, consistent with this Court's

plurality opinion in *Chavez v. Martinez*, 538 U.S. 760 (2003) – which found a violation of the right against self-incrimination occurs if one has been compelled to be a witness against himself in "any criminal case" – the Ninth Circuit held that all three pre-trial proceedings in which Michael's and Aaron's statements were used were part of the "criminal case" against them and supported a Fifth Amendment cause of action. (App. 36-45.)

The Ninth Circuit similarly reversed the District Court, holding instead that the Petitioners' brutal and coercive conduct – meant to overcome the will of adolescent boys – amounted to "psychological torture" and sufficiently "shocked the conscience" to support a Fourteenth Amendment Due Process claim. (App. 45-48.)

Furthermore, the Ninth Circuit reinstated other claims asserted against McDonough and Blum; the Crowes' deprivation of familial relationship claim based upon Michael's incarceration; and the Housers' deprivation of familial relationship claims based upon Aaron's incarceration. (App. 66-71.)

The Ninth Circuit, however, affirmed summary judgment as to all of Michael's and Aaron's Fourth Amendment violations (related to the existence of probable cause for their arrests and the searches of their homes); the Fourth Amendment conspiracy claim against McDonough; Michael's and Aaron's defamation claims against Prosecutor Stephan; Aaron's defamation claim against Blum; and all

claims against the municipal entity defendants. (App. 48-59, 68, 71-80.)

Finally, the Ninth Circuit affirmed the District Court's denial of summary judgment as to the Crowes' individual claims for Fourth Amendment violations arising out of their respective strip searches and drawing of blood samples; as well as their claims for wrongful detention and deprivation of familial companionship arising out of Michael and his sister, Shannon, being placed in protective custody. (App. 62-66.)

Petitioners thereafter petitioned the Ninth Circuit for rehearing and rehearing *en banc*, both of which were properly denied. (App. 6.)

III. REASONS FOR DENYING THE PETITIONS

A. Petitioners' Attempts to Manufacture Review of Respondents' Fifth Amendment Claims Has Recently Been Rejected by This Court and Should Be Rejected Again Now.

The Fifth Amendment provides that no person "shall be compelled *in any criminal case* to be a witness against himself." U.S. Const. amend. V (emph. added). This Court has emphasized that the "sole concern" of the Fifth Amendment is "to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . .

criminal acts.'" *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

Petitioners claim that in the wake of the *Chavez* plurality opinion, there is an alleged "conflict" within the Circuit Courts about when, precisely, a "criminal case" begins. As Respondents here explain, that argument is nothing new, but rather is precisely the same argument the Escondido Petitioners raised as amicus in support of review of the Ninth Circuit's prior decision in *Stoot v. City of Everett,* 582 F.3d 910 (9th Cir. 2009), *cert. denied*, April 5, 2010. This Court rejected those same arguments *just over seven months ago*, and should do so again now.

Moreover, as Respondents further explain, this case presents a uniquely poor vehicle for review of the widespread application of Fifth Amendment protections, as it involves juvenile criminal defendants who this Court has mandated should be subject to different interrogation standards (*i.e.*, "the greatest care" standard under *In re: Gault,* 387 U.S. at 55) than their fully emancipated adult counterparts. Accordingly, as that "greatest care" standard necessarily overlays the Ninth Circuit's Fifth Amendment analysis, this case is an inappropriate platform from which to extrapolate legal concepts meant to apply to a much broader population of criminal defendants.

1. The Alleged Split Between the Circuit Courts Does Not Warrant This Court's Attention at This Time.

With great hyperbole, Petitioners claim that a "deep circuit split" exists by relying on decisions from four Circuits – the Third, Fourth, Fifth, and Sixth Circuits. They do so by cherry-picking language from a small collection of cases in those Circuits which have never squarely addressed the "criminal case" question post-*Chavez*, as have the Second, Seventh, and Ninth Circuits. As set forth more fully below, the language on which Petitioners rely either pre-dates *Chavez*, or is *dicta* (not binding on future decisions in those Circuits) wrested from factually distinguishable decisions. Consequently, it remains unclear whether those Circuits would hold differently if they were actually confronted with the same compelling factual scenario presented in this case.

a. The Third Circuit.

For example, in the Third Circuit decision of *Renda v. King*, 347 F.3d 550, 553 (3rd Cir. 2003), the plaintiff was charged with giving false reports to law enforcement authorities. The Court of Common Pleas suppressed the plaintiff's statements due to *Miranda* violations and the case was *nolle prossed* by the District Attorney for lack of evidence. *Id.* The plaintiff filed an action pursuant to 42 U.S.C. § 1983 alleging, among other things, a violation of her Fifth Amendment rights. The Third Circuit held that the plaintiff's Fifth Amendment rights were not violated

because her statements were never used against her at trial. *Id.* at 559. In doing so, however, the Third Circuit failed to engage in any substantive analysis of the issue now presented to the Court. The decision simply states on this issue: " . . . our prior decision in *Giuffre* compels the conclusion that it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution." *Id.*

Notably, however, *Giuffre v. Bissell,* 31 F.3d 1241 (3rd Cir. 1994), upon which *Renda* relied, was a pre-*Chavez* case. Additionally, as correctly pointed out by the Seventh Circuit in the subsequent, post-*Chavez* decision of *Sornberger v. City of Knoxville, Ill.,* 434 F.3d 1006 (7th Cir. 2006), *Giuffre* was "decided before the Supreme Court determined in *Dickerson v. United States,* 530 U.S. 428 (2000), that the *Miranda* warnings themselves have constitutional status." *Id.* at 1025. The Seventh Circuit concluded therefore that "little weight" should be placed on the holding in *Giuffre,* given that subsequent change in the law. *Id.* Furthermore, *Giuffre* was factually similar to *Chavez* in that officers obtained a statement from the plaintiff during an allegedly coerced interrogation but charges were later dropped prior to the filing of a criminal case. *Id.* at 1244. Here, in contrast, Aaron's coerced statements were used in bringing criminal charges against him, in denying his pre-trial release, and in deciding whether to try him as an adult.

In short, the *Renda* decision relied entirely on a distinguishable pre-*Chavez* decision which failed to

set forth any detailed analysis to support its conclusion that a Fifth Amendment violation occurs only when a statement has been used at *trial*. As such, *Renda* does not present a proverbial "split" among the Circuits at all, let alone one that is sufficiently mature to warrant this Court's attention now. Indeed, faced with facts similar to those presented in this case – and given the guidance this Court has provided since in *Chavez* – it cannot be said with any degree of certainty that the Third Circuit would not agree with the Ninth Circuit's decisions in both *Stoot* and this case.

b. The Fourth Circuit.

Similarly, in the Fourth Circuit decision of *Burrell v. Virginia*, 395 F.3d 508, 510 (4th Cir. 2005), an officer approached the plaintiff at a traffic accident scene. When the plaintiff refused to answer any of the officer's questions, he was charged with obstruction of justice and operating an uninsured motor vehicle. *Id.* at 511. When the plaintiff's conviction on those charges was later overturned on appeal, he brought a § 1983 action alleging, among other things, his Fifth Amendment rights were violated by the state compelling him to produce evidence of insurance. *Id.*

The Fourth Circuit analyzed the plaintiff's claim under *Chavez* noting that this Court's plurality conclusion that a violation of the constitutional right of self-incrimination occurs *only* if one has been compelled to be a witness against himself in a criminal

case. *Id.* at 513, citing *Chavez,* 538 U.S. at 770. The *Burrell* court then focused on Justices Souter's and Breyer's concurrence in *Chavez* which concentrated on whether a violation required "*courtroom use* of a criminal defendant's compelled, self-incriminating testimony. . . ." *Id.,* citing *Chavez,* 538 U.S. at 777 (emph. in orig.). Based on that reasoning alone, *Burrell* concluded "[Plaintiff] does not allege any *trial* action that violated his Fifth Amendment rights: thus, *ipso facto,* his claim fails on the plurality's reasoning." *Id.* But closer scrutiny reveals that *Burrell's* statement regarding requirement of a "trial" action is pure *dicta.* Indeed, the plaintiff in *Burrell* never alleged any "courtroom use" of statements since he only asserted a violation occurred at the time summonses were issued by the state. *Id.* Thus, that language, as it related to the question presented by the limited facts of that particular case, went well beyond those facts and consequently, would not be binding on subsequent cases.

In fact, the Seventh Circuit in *Sornberger,* which reached the same conclusion as the Ninth Circuit in this case, explained why that isolated language in *Burrell* created no conflict with its own holding:

> We do not see conflict between our holding today and that of our sister circuit in *Burrell.* There, Burrell claimed that his constitutional rights were violated when the police issued him an obstruction of justice summons for invoking his right to remain silent. The Fourth Circuit held that the issuance of

> a summons was not a "*courtroom use* of a criminal defendant's compelled, self-incriminating testimony," and therefore Burrell failed to state a claim under § 1983 for violation of his right against self-incrimination. Here, by contrast, Teresa's confession was used at a preliminary hearing to find probable cause to indict, to arraign and to set her bail. More than the mere issuance of a summons, failure to administer Teresa *Miranda* warnings led to three distinct "courtroom uses" of her unwarned statements.

Sornberger, 434 F.3d at 1027.

Consequently, it is entirely unclear whether the Fourth Circuit would hold differently given the facts of this case. Indeed, like the situation in *Sornberger* and unlike the situation in *Burrell*, the coerced statements used against Aaron formed the basis for filing formal charges against him, were used to determine his pre-trial custody status, and led to Aaron being tried as an adult, all "courtroom uses." As such, the "courtroom use" of the statement that was entirely lacking in *Burrell* is fully present in this case, as it was in *Sornberger*. Accordingly, the Fourth Circuit's decision in *Burrell* does not present a split among the Circuits, but must be viewed as limited to the facts before it, which are clearly distinguishable from those found in this case.

c. The Fifth Circuit.

In the Fifth Circuit's decision of *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005), the plaintiff (a juvenile) was charged with capital murder and injury to a child. The plaintiff's statements, obtained without taking her before a magistrate or notifying her parents or an attorney as required by Texas law, were used against her during two different trials leading to her conviction. *Id.* at 284. The Texas Court of Appeals, however, reversed those convictions due to improperly acquired statements. *Id.* The plaintiff subsequently brought a § 1983 action alleging, among other things, a violation of her Fifth Amendment rights. *Id.*

When the plaintiff challenged the trial court's grant of qualified immunity, the Fifth Circuit stated: "The Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only at trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right." *Id.* at 285. The *Murray* court, however, provided no analysis regarding the question presented in this case, or clarified by the *Chavez* plurality: *pre-trial use of coerced statements within the criminal case*. Indeed, as in *Burrell,* that statement was circumscribed by the facts before it, as the plaintiff's confession in *Murray* had, in fact, been used *two different times* against her at trial. *Id.* at 284. Thus, *Murray* cannot be reasonably construed as going beyond its limited facts to reach a scenario where, like here, those same self-incriminating

statements are used in various pre-trial proceedings which implicate substantial liberty interests. Indeed, if confronted with the significantly distinguishable facts present in this case, it is unclear whether the Fifth Circuit would hold any different than the Ninth Circuit did in this case, or be bound by the factually dissimilar situation presented in *Murray*.

d. The Sixth Circuit.

Finally, in *McKinley v. City of Mansfield,* 404 F.3d 418, 425 (6th Cir. 2005), the self-incriminating statements in question were introduced at trial and played a "central role" in the plaintiff's conviction. Consequently, the *McKinley* court's recitation of the rule (in a mere footnote, no less) that the Fifth Amendment is a "trial protection" right was appropriate on the limited facts before it. But it does nothing to require a similar holding where another court in the Sixth Circuit is later confronted with the facts present in this case: pre-trial use of a self-incriminating statement within the confines of the criminal case.

Again, like the decision of the Fourth Circuit in *Burrell,* and the Fifth Circuit in *Murray,* the Sixth Circuit's mere recitation in *McKinley* of a "trial protection" rule – without any further analysis – does not define the contours of the Fifth Amendment in that Circuit, but must instead be viewed within the limited facts presented to the *McKinley* court. Indeed, none of the decisions on which Petitioners rely have

squarely addressed the different factual situation present here, and none would prohibit another court from ruling exactly as the Ninth Circuit did in this case if they are confronted with those distinguishable facts in the future.

In contrast, every Circuit which has squarely addressed pre-trial use of self-incriminating statements in the "criminal case" has uniformly followed this Court's guidance in *Chavez* and found such use to violate the Fifth Amendment. See, *e.g.*, *Sornberger,* 434 F.3d at 1026; *Higazy v. Templeton,* 505 F.3d 161, 172 (2nd Cir. 2007); *Stoot,* 582 F.3d at 925-926. There is no reason to believe the results would be any different if (and when) the Third, Fourth, Fifth and Sixth Circuits have the opportunity to confront that same issue. But until they do – and render a decision on similar facts which is actually at odds with the decisions of the Second, Seventh, and Ninth Circuits – any alleged "conflict" raised by the Petitioners is simply non-existent, let alone sufficiently mature at this juncture to warrant this Court's attention.

2. The Compelling Facts of This Case Make It a Uniquely Poor Vehicle for Review of the Widespread Application of Fifth Amendment Protections.

As mentioned at the outset of this brief, one of the most compelling aspects of this case is that it involves juveniles (boys, ages 14 and 15) – with no

prior criminal history or contact with the police – who were subjected to hours of coercive interrogation *before* they were ever apprised of their *Miranda* rights. While Petitioners pay lip service to this fact, they just as quickly go on *to forget* Respondents' relative youth, condoning inquisitorial techniques and practices which have been found to be appropriate, if at all, for adult criminal suspects.

But the standards for exercising the "greatest care" in analyzing police interrogations of juveniles are well-established, and run directly contrary to the authority relied upon by Petitioners. Indeed, as this Court made clear over a half-century ago in *In re: Gault*:

> We appreciate that *special problems* may arise with respect to waiver of the [Fifth Amendment] privilege by or on behalf of children, and that there may well be some differences in technique – but not in principle – depending upon the age of the child and the presence and competence of parents . . . , the *greatest care* must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

In re: Gault, 387 U.S. at 55 (emph. added).

There can be no doubt that those "special problems" – as well as the established body of law from this Court and others which deal specifically with the

care which must be afforded juvenile criminal defendants in custodial interrogations – properly influenced the Ninth Circuit's analysis of Aaron's Fifth Amendment claims, and would do the same if this Court were to review this case. Consequently, the "special problems" inherent in addressing a juvenile case, and the unique and compelling factual issues involved in this case, make it an inappropriate vehicle for resolving the questions presented.

3. Petitioners' Claim That the Ninth Circuit's Decision Will Have a "Chilling Effect" on Law Enforcement Activities Is Supported Neither By Fact Nor Law.

In a reprise of the unsuccessful arguments they offered in the *Stoot* case, Petitioners again argue the Ninth Circuit's decision in this case will have a "chilling effect" on law enforcement activities. Specifically, Petitioners suggest that the Ninth Circuit's opinion creates an unworkable standard that will expose law enforcement officers to unnecessary lawsuits and civil liability, blithely characterizing this case as involving "garden variety" interrogation techniques, even where juveniles were involved.

Those arguments, however, presuppose that law enforcement officers do not have to follow rules applicable to interrogations and that if they do not, there will be no repercussions. To the contrary, this Court's precedent, beginning with *Miranda* and

continuing to the present day, sets forth clear requirements for a proper interrogation. A law enforcement officer must follow those rules or face the consequences.

Here, the record aptly demonstrates how time and again, Petitioners deliberately flouted those rules by interrogating Michael and Aaron for hours, and only *Mirandizing* them at the end of those interrogations *after* they had overcome the boys' will and secured the confessions they were seeking. Consequently, Petitioners' arguments about the need for "proper guidelines" rings hollow when the record shows how *they deliberately violated the guidelines this Court has already provided in myriad cases.* Moreover, at the time Petitioners took that action, it was firmly established in the Ninth Circuit that the defense of qualified immunity is not available to police officers who knowingly violate the law. *Cooper v. Dupnick,* 963 F.2d 1220, 1251 (9th Cir. 1992), overruled on other grounds in *Chavez,* 538 U.S. 760. Rather than justifying protection for the proper exercise of their duties, when law enforcement officials act as they have in this case, "they invite redress under section 1983." *Id.* at 1252.

Petitioners' fall-back position – that the police cannot, as a matter of law, be found liable for any Fifth Amendment violation where prosecutors (and not they) introduce those coerced statements at trial – merits even less consideration. Such an argument lacks *any* legal support, and, in fact, has been squarely rejected by the very authority cited by

Petitioners. See *McKinley,* 404 F.3d at 436-437, fn. 23 (addressing the District Court's decision in this case and finding its reasoning wholly "unpersuasive"). *McKinley* then cited a long train of authority – including *Chavez* – where it has never been questioned that the police may be held liable under § 1983 for violating someone's Fifth Amendment rights. *Id.*

Indeed, as both the Sixth Circuit in *McKinley* and the Ninth Circuit in this case properly concluded, a rule barring suits against the police for Fifth Amendment violations *is a rule barring any suits for Fifth Amendment violations*, given that prosecutors are *absolutely immune* from suit for their conduct as advocates within the judicial process. *Id.* at 437-438, citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

But it cannot be – and in fact, has never been – that invasions of the right against compelled self-incrimination are not actionable. Consequently, Petitioners' assertions to the contrary should be rejected by this Court on that basis alone. (App. 42-44.)

In sum, as freedom from compulsion lies at the heart of the Fifth Amendment, no purpose would be advanced by making the police immune, as a matter of law, from the protections that Amendment provides. Indeed, if this were the case, the police would only be *encouraged* to compel coerced and self-incriminating statements with complete impunity. Surely, such a result would be wholly contrary to a

long train of well-settled authority meant to regulate and discourage such police misconduct under the aegis of the Fifth Amendment.

B. Petitioners' Arguments That There Is a Need to Clarify "Conscience Shocking" Behavior Under the Fourteenth Amendment Also Fails to Raise an Issue Worthy of This Court's Review.

1. This Court's Decisions Are Replete with Examples of Verbally Coercive Interrogations Which Violate the Fourteenth Amendment.

Petitioners assert that the Ninth Circuit's opinion in this case creates uncertainty and confusion about what conduct is sufficiently "conscience shocking" to warrant Fourteenth Amendment liability. They premise that argument on the assertion that "verbal" coercion and deception should not be enough, even where juveniles are the target of that coercion.

But over a half-century ago in *Haley,* this Court found that a 15-year-old boy – *based upon verbal coercion alone* – was necessarily ill-equipped to withstand an overnight police interrogation resulting in his coerced confession. *Haley,* 332 U.S. at 599-600. Writing for the Court, Justice Douglas reasoned that such a juvenile "cannot be judged by the more exacting standards of the law," and further observed "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early

teens." *Id.* Recognizing both that such a boy "questioned through the dead of night by relays of police, is a ready victim of the inquisition," and that while "mature men possibly might stand the ordeal . . . a lad of tender years is no match for the police in such a contest," the *Haley* court demanded that "*special care* in scrutinizing the record must be used" in order to protect the constitutional rights of juveniles, and to prevent the police from using custodial interrogations for "wringing confessions from them." *Id.* at 599-601 (emph. added).

Not 14 years later, in *Gallegos v. Colorado,* 370 U.S. 49 (1962), this Court was again called upon to scrutinize a confession wrought from a juvenile in the course of a custodial police interrogation. Finding that the youth of the accused – 14 years old – was a "crucial factor" in determining whether due process violations had occurred, the *Gallegos* court reasoned:

> [A] 14 year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and is unable to know how to protect his own interests or how to get the benefit of his constitutional rights.

Id. at 1212.

Over the prosecution's continuing assertion that such youth and immaturity were "irrelevant" in light

of the allegedly "voluntary" nature of the confession made, the *Gallegos* court retorted:

> But if we took that position, it would, with all deference, be in callous disregard of this boy's constitutional rights. He cannot be compared with an adult in full possession of his senses, and knowledgeable of the consequences of his admissions.

Id. at 1212-1213.

Consequently, *Gallegos*, like *Haley* before it, concluded that "the formal confession on which this conviction may have rested was obtained in violation of due process." *Id.* at 1213.

Not four years later, the Court in *In re: Gault*, 387 U.S. 1, again stressed the importance that youth plays in determining whether a confession is coerced, and echoed the mandate that "the *greatest care*" must be taken to assure that juvenile confessions are "voluntary, in the sense not only that [they are] not coerced or suggested, but also that [they are] not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Gault,* 387 U.S. at 55 (emph. added). That "greatest care" standard was based upon this Court's review of several lower court decisions confirming how juvenile confessions are often "the product of fear and fatigue due to extensive police grilling," and how "the frightening atmosphere of a police station is likely to have a harmful effect on the mind and will of the boy." *Id.* at 52-53 (internal quotes omitted). And so the *Gault* court, too,

concluded with the continuing recognition that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." *Id.*

In the several decades since *Haley, Gallegos*, and *Gault*, other courts have universally followed this same line of reasoning, insisting that the law view juveniles differently than their adult counterparts.[5] Most notably, however, is the fact that the police conduct in those cases was "verbal," as it was in this case. Indeed, as this Court has repeated many times, coercion can be mental as well as physical, as "the blood of the accused is not the only hallmark of an

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[5] See, *e.g., Woods v. Clusen*, 794 F.2d 293, 296-298 (7th Cir. 1986), (finding that various coercive police techniques – relays of police interrogators, lying about the state of the evidence, promises of leniency – violated a 16-year-old's Fourteenth Amendment rights, given his relative age, experience, and education); *Taylor v. Maddox*, 366 F.3d 992, 1013-1016 (9th Cir. 2004) (applying *Haley's "greatest care"* standard to reject a coerced confession wrought from a 16-year-old juvenile and ultimately finding that the police had clearly violated the juvenile's Fourteenth Amendment rights. Secondary authority is also in accord. See 87 A.L.R.2d 624, *Voluntariness and Admissibility of Minor's Confessions*; 82 N.C.L. Rev. 891, 944, *The Problem of False Confessions in the Post-DNA World*; see also 30 N.Y.U. Rev.L. & Soc. Change 209, *The Reality of False Confessions – Lessons of the Central Park Jogger Case* (recounting in chilling detail how and why five juvenile boys subjected to heavy-handed police interrogation techniques confessed their involvement in an infamous crime they did not commit, and were prosecuted and convicted on the basis of those confessions alone, until the real killer, a serial rapist and convicted murderer, confessed to the crime some thirteen years later.)

unconstitutional inquisition." See, *e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *Reck v. Pate*, 367 U.S. 433, 440-441 (1961); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

Here, the Ninth Circuit concluded from the record before it that Michael's and Aaron's confessions were the product of "psychological torture," and that "[o]ne need only read the transcripts of the boys' interrogations, or watch the videotapes, to understand how thoroughly the defendants' conduct in this case 'shocks the conscience.'" (App. 47.)

On that record, and in light of the clearly established standards governing even verbal coercion which run through myriad decisions of this Court, there is absolutely no need for this Court's intervention at this time.

2. Petitioners' Companion "Shocks the Conscience" Arguments Warrant Even Less Scrutiny by This Court.

Petitioners badly mischaracterize the Ninth Circuit's opinion and the record below to float two companion arguments, neither of which warrants this Court's review. Specifically, Petitioners assert that a Fifth Amendment violation based upon coercive interrogation techniques, and a Fourteenth Amendment violation based upon deprivation of familial companionship, cannot be found absent conscience shocking behavior.

But those arguments belie the fact that the Ninth Circuit, in finding that Petitioners violated Michael's and Aaron's Fifth Amendment rights, necessarily relied upon the same conscience shocking behavior that also formed the basis for Petitioners' violation of the boys' Fourteenth Amendment rights. In other words, the same coercive interrogation techniques employed by Petitioners amounted to violations of *both* Constitutional protections, given the egregious nature of that conduct. That this is so does not indicate that this case is at variance with any other decisions, but merely reflects the compelling facts which were before the Ninth Circuit, implicating both Fifth Amendment and Fourteenth Amendment protections.

Similarly, Petitioners' assertion that a deprivation of familial companionship claim under the Fourteenth Amendment requires conscience shocking behavior – and not mere "unwarranted interference" – is also an inadequate grounds for review. Indeed, in this case, it was the Petitioners' conscience shocking and coercive interrogation tactics which the Ninth Circuit found to have caused Aaron's wrongful incarceration and concomitant separation from his family. (See App. 69 ["Because Michael's and Aaron's continued detentions were wrongfully justified by their illegally coerced confessions, we reverse"].) Thus, although the Ninth Circuit applied the proper standard in reinstating that familial relationship claim, even if it were to have applied the "conscience shocking standard" Petitioners espouse, *the outcome would*

have been exactly the same. Accordingly, there is no reason for this Court to intervene on facts which would compel the same outcome, irrespective of the standard applied.

C. The Ninth Circuit's Reversal of Summary Judgment on the Conspiracy Claim Asserted Against Blum Was Entirely Fact-Driven and Therefore Presents No Legal Issue for This Court to Clarify.

Blum's individual argument – that as a private citizen, he cannot be held liable for conspiracy to violate Michael's and Aaron's constitutional rights – is presented without regard to the controlling standard of review at summary judgment. Indeed, Blum recites at length improper factual findings made by the District Court as if they had been made after trial. In contrast, the Ninth Circuit simply determined that genuine questions of material fact exist regarding the level and extent of Blum's involvement which could not be determined at summary judgment, and reversed the District Court on that basis. (App. 66-68.)

Rather than running contrary to this Court's decision in *Richardson v. McKnight,* 521 U.S. 399, 412 (1997), that conclusion by the Ninth Circuit only confirms that Blum is not automatically entitled to § 1983 immunity merely because he is a private individual, as was his primary argument on appeal. Moreover, as Blum's own petition reveals, such a

holding is not a matter of controversy, but has been echoed in the decisions of "nearly every other Circuit Court" which has considered the issue. Thus, the compulsion for this Court's review is clearly lacking.

Perhaps more importantly, however, is the fact that the Ninth Circuit did not deny Blum qualified immunity based upon a "blanket prohibition" that private actors are never entitled to such immunity, as Blum contends. Indeed, the cases which Blum cites hold to the contrary. See, *e.g., Franklin v. Fox,* 312 F.3d 423, 445 (9th Cir. 2002) (which Blum claims applied a "blanket denial of qualified immunity to [a] private individual," but which instead upheld the district court's grant of summary judgment upon a finding that no evidentiary basis existed for the conspiracy claim the plaintiff had asserted as the sole basis for § 1983 liability against that individual); *Clement v. City of Glendale,* 518 F.3d 1090, 1096-1097 (9th Cir. 2008) (which Blum also asserts demonstrates the Ninth Circuit's trend of "blanket denial" of qualified immunity to private individuals, but which instead extended immunity to a private towing company under *Richardson's* "good faith" defense to § 1983 liability).

In any event, notwithstanding whatever post-*Richardson* "blanket prohibition" Blum believes he may have discerned from those decisions, *no such automatic rule played any role here.* Instead, the Ninth Circuit simply concluded that the record evidence regarding Blum's involvement raised factual

questions which could not be properly determined at summary judgment:

> The record shows that the quality of Blum's involvement in the interrogations is not categorically inconsistent with a tacit "meeting of the minds." According to one of the detectives, Blum helped the police formulate a "tactical plan" to approach the interview. Moreover, the detectives "pretty much" followed his advice after these consultations. Insofar as these tactics and lines of questioning by the detectives shock the conscience, as demonstrated above, summary judgment in favor of Blum is unwarranted.

(App. 67.)

Thus, in determining that a meeting of the minds could be inferred from the circumstantial evidence (including Blum's involvement in the interrogations and in formulating and directing the tactical plan), the Ninth Circuit reasoned that the evidence was sufficient for a reasonable factfinder to conclude it was "unlikely to have been undertaken without an agreement." (App. 67-68.) On that basis alone, the Ninth Circuit quite correctly reversed summary judgment as to Blum. There is nothing controversial about that proper application of well-settled summary judgment standards. Consequently, there is no issue of law for this Court to clarify now.

IV. CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant their various petitions. For the foregoing reasons, Respondents respectfully request this Court to deny those petitions.

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In The Supreme Court of the United States

CHRISTOPHER MCDONOUGH,

Petitioner,

vs.

MICHAEL CROWE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONSOLIDATED REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

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REASONS TO GRANT PETITION

Fifth Amendment. The Court should grant review to resolve the circuit conflict concerning whether use of coerced testimony in pretrial criminal proceedings violates the Fifth Amendment. Respondents' suggestion there is no conflict is belied by the case law. And Respondents' insistence this case is a poor vehicle for resolving the conflict since it involves minors, is belied by logic: That minors are involved has no bearing on whether pretrial use of coerced testimony constitutes a "use" violation of the Fifth Amendment.

The Court should also grant review to delineate what constitutes coercive interrogation of a minor under the Fifth Amendment. Respondents' claims against Petitioner Christopher McDonough are very narrow, largely confined to his having deceived the minor plaintiffs during interrogation – a well established, judicially sanctioned interrogation technique. If such tactics violate the Fifth Amendment, or if there are special rules for minors, police departments and their officers must know. Can officers ever deceive minor suspects? If so, when? Such interrogations are a daily part of law enforcement practice and clear guidelines are essential, both to avoid potential liability and to assure admissible evidence in criminal proceedings.

Fourteenth Amendment. Review is also necessary to resolve what type of conduct violates the Fourteenth Amendment. McDonough did not raise his

voice or threaten the suspects in any way. As noted, Respondents' chief complaint is that McDonough lied to the minor plaintiffs. The Ninth Circuit concluded this alleged conduct "shocked the conscience" and thus exposed McDonough to liability under the Fourteenth Amendment. In response, Respondents neglect even to mention the bevy of cases establishing that, in so holding, the Ninth Circuit has parted company with this Court's precedents and the law of other circuits.

Finally, review is necessary to bring the Ninth Circuit into line with every other circuit regarding the standards for establishing a substantive due process claim for deprivation of familial companionship. The Ninth Circuit expressly repudiated this Court's holding that *any* Fourteenth Amendment substantive due process claim hinges on whether the challenged conduct "shock[s] the contemporary conscience." *See County of Sacramento v. Lewis*, 523 U.S. 833, 836, 847 n.8 (1998). Respondents' only answer is that even if the Ninth Circuit applied the incorrect standard, it was not prejudicial because the result would have been the same under the correct standard. As noted however, even under the "shocks-the-conscience" standard there should be no liability here. But in any event, the confusion sowed by the Ninth Circuit's published opinion exists regardless of prejudice. The Court should eliminate that confusion by resolving the conflict.

I. THIS CASE PRESENTS A PROPER VEHICLE TO RESOLVE THE INTER-CIRCUIT CONFLICT REGARDING WHETHER USE OF COERCED TESTIMONY IN PRETRIAL PROCEEDINGS VIOLATES THE FIFTH AMENDMENT.

To provide government officials with guidance regarding the circumstances under which they may use a suspect's testimony, the Court should resolve the circuit conflict concerning whether use of coerced testimony in pretrial criminal proceedings violates the Fifth Amendment. (McDonough Cert. Petition ["McDonough"] 16-22.)

Respondents insist that there is no split among the circuits or, in any event, that this case presents a poor vehicle for resolving it. They are wrong.

A. The Third And Fourth Circuits Have Rejected Fifth Amendment Claims Based On Pretrial Use Of A Suspect's Statements.

Respondents agree that the Second, Seventh and Ninth Circuits have held that use of a suspect's coerced statement at *any* criminal proceeding violates the Fifth Amendment. (Houser Opp. 20-27.) But they insist the Third and Fourth Circuits have never taken the opposite view. (*Id.*)

In fact, the Third and Fourth Circuits have squarely held that pretrial use of coerced testimony

does not violate the Fifth Amendment. (*See* McDonough 17-18, citing *Renda v. King*, 347 F.3d 550 (3d Cir. 2003); *Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005).)

Boiled down, Respondents' response is that one circuit got the law wrong and the other dealt with distinguishable facts. Respondents argue that review is unnecessary because both circuits might agree with the Ninth Circuit if confronted with the facts here. (Houser Opp. 21-24.)

But it is far from clear that the Third and Fourth Circuits would have found a violation here. Both Circuits considered *Chavez v. Martinez*, 538 U.S. 760 (2003) and then rejected use violation claims in *broad* language limiting the Fifth Amendment to use of testimony at trial. *Renda*, 347 F.3d at 559 ("it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution"); *Burrell*, 395 F.3d at 514 (plaintiff's claim failed under the *Chavez* plurality opinion because "[h]e does not allege any *trial* action that violated his Fifth Amendment rights").

The district courts in eight states are bound by that language. If, as Respondents contend, that language results from weak reasoning or dictates the wrong result, this Court's review is necessary to correct it. But the fact remains: The split among the circuits is real and requires the Court's attention.

Moreover, the Third and Fourth Circuit cases conflict more directly with the Ninth Circuit's opinion in this case than Respondents acknowledge.

Renda v. King. The Third Circuit recognized that *Chavez* left open the question of when a criminal proceeding commences for purposes of the Fifth Amendment "use" violation inquiry. *Renda*, 347 F.3d at 559. Without guidance from this Court, the Third Circuit based its decision on its own precedent, *Giuffre v. Bissell*, 31 F.3d 1241 (3d Cir. 1994), holding that use of coerced statements to obtain an indictment does not violate the Fifth Amendment. Respondents' attacks on that conclusion go to the merits of the issue that McDonough has presented for review, not to whether the issue warrants this Court's attention.

In any event, Respondents' attacks on *Renda*'s reasoning lack merit. Specifically, Respondents emphasize that *Giuffre* predates *Dickerson v. United States*, 530 U.S. 428 (2000), a *Miranda* case. (Houser Opp. 21.) But *Renda* expressly held that *Giuffre* remained good law after *Dickerson* and *Chavez*. *Renda*, 347 F.3d at 557-58. ("[I]n light of the Supreme Court's recent decision in *Chavez*, it is clear that *Giuffre* still is good law following *Dickerson*, and that the District Court properly ruled that questioning a plaintiff in custody without providing *Miranda* warnings is not a basis for a § 1983 claim as long as the plaintiff's statements are not used against her at trial").

Respondents also emphasize that in *Giuffre*, the charges were dropped prior to the filing of a criminal case. (Houser Opp. 21.) But it is the facts of *Renda*, not of *Giuffre*, that matter here. And in *Renda*, the plaintiff was arrested, arraigned, and incarcerated based on her coerced testimony. *Renda*, 347 F.3d at 553; *see also id.* at 559-60. Thus, *Renda* stands in stark contrast to the present case, where the Ninth Circuit held that pretrial use of coerced testimony violates the Fifth Amendment.

Burrell v. Virginia. The Fourth Circuit case, *Burrell*, also creates a clear circuit split. Contrary to Respondents' description, *Burrell* expressly relied on the *Chavez* plurality's reasoning: The Fourth Circuit explained that the *Chavez* plurality found no "use" violation because the compelled testimony was not admitted in court, and that Justice Souter's concurrence found no use violation because the plaintiff had failed to make a showing justifying the attachment of civil liability to police interrogations. 395 F.3d at 513. *Burrell* then concluded, "[o]n the reasoning of either the *Chavez* plurality or Justice Souter's concurrence in the judgment, Burrell's Fifth Amendment section 1983 claim fails to state a claim." *Id.* at 514.

Thus, *Burrell*'s conclusion that the plaintiff's Fifth Amendment claim failed under the *Chavez* plurality's reasoning because he "does not allege any *trial* action that violated his Fifth Amendment rights" (*id.*), directly conflicts with the Ninth Circuit's conclusion here.

B. This Case Presents An Excellent Vehicle For Resolving The Circuit Conflict.

Respondents suggest this case is a poor vehicle for reviewing the Fifth Amendment questions because it involves juvenile suspects, who are subject /to different – and more stringent – interrogation standards than their fully emancipated adult counterparts. (Houser Opp. 19.)

Respondents' argument is a non sequitur. The fact that police must take great care when interrogating minors to avoid coercing confessions has no bearing on whether pretrial use of coerced testimony constitutes a "use" violation under the Fifth Amendment. Whether pretrial use of coerced testimony is permissible depends on how the Court construes the word "use" in the Fifth Amendment, not on the age of the suspects.

Finally, Respondents point out that just seven months ago, this Court declined to grant a petition for writ of certiorari in *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009), cert. denied, April 5, 2010. (Houser Opp. 19.) But the fact that the same issue has arisen in two cases from a single Circuit in consecutive terms illustrates the recurring nature of Fifth Amendment claims premised on pretrial use of a suspect's testimony.

In the seven years since *Chavez*, five circuits have split on whether pretrial proceedings constitute a "criminal case" for purposes of the Fifth Amendment.

The Court should resolve the conflict and bring certainty to an area of the law impacting the daily work of police departments and prosecutors across the country.

II. REVIEW IS NECESSARY TO RESOLVE THE INTER-CIRCUIT CONFLICT REGARDING WHAT CONSTITUTES COERCIVE INTERROGATION OF A MINOR SUSPECT UNDER THE FIFTH AMENDMENT.

The Court should also grant review to resolve the circuit split regarding whether the routine interrogation techniques that McDonough employed here constitute coercion for Fifth Amendment purposes. (McDonough 22-29.) McDonough's tactics – accusing the suspect of lying, implying that others have implicated the suspect and touting the accuracy of the CVSA machine – have garnered widespread judicial acceptance. By concluding these techniques run afoul of the Fifth Amendment, the Ninth Circuit's decision has thrown the law into disarray.

Respondents argue – without any case citations – that Petitioners' arguments "presuppose that law enforcement officers do not have to follow the rules applicable to interrogations and that if they do not, there will be no repercussions." (Houser Opp. 29.) But what those "rules applicable to interrogations" might be, Respondents do not say.

And, in fact, while the Court has spoken generally of the need to treat the interrogation of minors with greater sensitivity than the interrogation of adults, it has *never* delineated whether and when the routine techniques that McDonough employed here constitute coercion.

The Ninth Circuit's decision even casts doubt on what constitutes compelled testimony. As Respondents correctly acknowledge, "freedom from compulsion lies at the heart of the Fifth Amendment." (Houser Opp. 31.) Yet here, the *sine qua non* of compulsion – overriding the suspect's will – is absent. McDonough's interrogations yielded no confession from either suspect.

Respondents take McDonough to task for using deception in his interrogations. (*See* Houser Opp. 9-10, 11-12.) But lying to a suspect is a judicially-sanctioned interview technique. So the question remains: What kind of rule do the Respondents and the Ninth Circuit propose? Can an officer never lie to a minor? Sometimes? And if so, when? The answers to these questions are essential to the day-to-day work of police across the country, both for purposes of avoiding civil liability and assuring admissibility of evidence in criminal proceedings. The "I-know-it-when-I-see-it-standard" that the Ninth Circuit has effectively imposed here does not help officers in practice. To avoid inadvertently violating the Fifth Amendment, officers need clear guidance on what interrogation techniques are permissible.

At the very least, the Court should grant review to reaffirm that officers who use routine police interrogation techniques and who do not actually compel testimony are entitled to qualified immunity. Ample case law approves the interrogation techniques used in the present case. (*See* McDonough 24-25.) Accordingly, no reasonable police officer would have known in advance that the type of accepted police practices utilized here would subsequently be deemed improper. (*Id.* at 28-29.)

In response, Respondents ignore the case law condoning the exact interrogation techniques used in the present case. Instead, they state *ipse dixit* that "no purpose would be advanced by making the police immune, as a matter of law, from the protections that [the Fifth] Amendment provides." (Houser Opp. 31.) This is no response at all.

III. THE COURT SHOULD RESOLVE THE INTER-CIRCUIT CONFLICT REGARDING WHETHER PURELY VERBAL CONDUCT NOT INCLUDING THREATS VIOLATES THE FOURTEENTH AMENDMENT.

The Ninth Circuit's opinion also represents a stark departure from the voluminous case law of this Court and of other circuits establishing that purely verbal conduct devoid of any threats of harm does not "shock the conscience" and therefore subject a police officer to Fourteenth Amendment liability. (*See* McDonough 29-41.)

In response, Respondents *ignore* the voluminous case law establishing that where the police conduct at issue is not physical, the "conscience-shocking" standard is nearly impossible to meet. (*See* Crowe Opp. 24-25; Houser Opp. 32-36.) Instead, they cite a series of cases discussing whether a given statement by a juvenile suspect was admissible at trial. (Houser Opp. 32-36, citing *Haley v. Ohio*, 332 U.S. 596 (1948) (reversing conviction where suspect's coerced testimony was used at trial); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (same); *In re Gault*, 387 U.S. 1 (1967) (same).)

But whether a statement has been coerced and thus is inadmissible at trial is a distinctly different question than that posed here: Whether purely verbal conduct devoid of any threats can subject an officer to liability for civil damages under the Fourteenth Amendment. The standards for the two questions are decidedly different. A statement can be coerced, and thus inadmissible pursuant to the Fifth Amendment's guarantee against self-incrimination, without rising to the level of a violation of the Fourteenth Amendment. *Compare Cunningham v. Wenatchee*, 345 F.3d 802, 810 (9th Cir. 2003) (interview is coercive where "the officer's tactics undermined the suspect's ability to exercise his free will") *with Fontana v. Haskin*, 262 F.3d 871, 882 n.7 (9th Cir. 2001) (to violate Fourteenth Amendment, interview tactics must be "'so egregious, so outrageous, that [they] may fairly be said to shock the contemporary conscience'").

These different standards make sense. Where a suspect's coerced testimony is used at trial, the Fifth Amendment provides the avenues for redress – either by providing a basis for reversing the conviction or by providing a basis for the suspect to seek civil damages. But where the suspect's testimony is *not* used at trial, the more stringent standards embodied by the Fourteenth Amendment must be met before he can obtain civil damages.

Given these different standards, the case law cited by Respondents discussing whether an interrogation resulted in coerced testimony that was inadmissible at trial, provides no basis for concluding that the Ninth Circuit's opinion here – holding that purely verbal conduct is sufficient to constitute a Fourteenth Amendment violation – is anything other than a departure from this Court's precedents and the precedents of the other circuits.

The confusion wrought by such amorphous due process claims is underscored by Respondents' claims against McDonough. Respondents fault McDonough for deceiving the juvenile suspects. (*See* Houser Opp. 32.) But case law sanctions lying to a suspect. Thus, the Ninth Circuit's decision radically lowers the bar for what violates the Fourteenth Amendment – it casts doubt on whether conduct that may not even constitute coercion suffices. By suggesting that an officer cannot lie to a juvenile suspect without exposing himself to liability under the Fourteenth Amendment, the Ninth Circuit's opinion creates uncertainty

regarding what police can do. Can an officer ever lie? If it is sometimes permissible for an officer to lie, under what circumstances is it permissible? What kind of deception rises to the level of a substantive due process violation?

Respondents are correct (Houser Opp. 36), that the Ninth Circuit concluded that these interrogations could violate the Fourteenth Amendment. But both the district court and the trial court (in the underlying criminal case) listened to the same tape recordings of the interviews and found that McDonough's conduct was not extreme or outrageous. This disparity evidences the problem with the Ninth Circuit's decision: Law enforcement agencies and officers across the country will be subject to litigation on the basis of vague standards that vary from courtroom to courtroom. The Court should grant review to eliminate the amorphous tort the Ninth Circuit created here.

At least, the Court should grant review to make it clear that McDonough, and police officers like him, are entitled to qualified immunity for the conduct at issue here. No reasonable officer would have believed that McDonough's calm, measured tone and relatively innocuous questions constituted a "conscience-shocking" interrogation. (McDonough 38-41.) Respondents offer no response to McDonough's contention that he is entitled to qualified immunity.

IV. REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT REJECTED THE WELL-ESTABLISHED "SHOCKS-THE-CONSCIENCE" STANDARD AS TO FOURTEENTH AMENDMENT CLAIMS FOR DEPRIVATION OF FAMILIAL RELATIONSHIP.

The Court should grant review because the Ninth Circuit has expressly rejected the "shocks the conscience" standard that has long been the threshold requirement for all Fourteenth Amendment violations. *See Lewis*, 523 U.S. at 846-49 & n.8. (*See* McDonough 41-43.)

The Crowe Respondents respond by stating *ipse dixit* that, "The Ninth Circuit used the correct legal standard ('unwarranted interference') for interference with family relations and the Petition does not show compelling reasons to grant certiorari to decide this question." (Crowe Opp. 25.) But as demonstrated, this isn't true.

The Houser Respondents respond to the Ninth Circuit's rejection of the "shocks-the-conscience" standard by arguing that even if the Ninth Circuit erred, "the outcome would have been exactly the same" had it used the correct standard. (Houser Opp. 37-38 (emphasis omitted).) However, as noted, the Ninth Circuit's application of the "shocks the conscience" test is dubious here. And in any event, regardless of prejudice, the fact remains that the Ninth Circuit has espoused a standard in a published

opinion that is squarely at odds with the "shocks-the-conscience" standard that has long been the threshold requirement for all Fourteenth Amendment violations. It is essential that the Court resolve the conflict and eliminate the confusion.

CONCLUSION

For the foregoing reasons, Petitioner urges that the petition be granted.

DATED: November 30, 2010

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